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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE F. DIAMOND, M.D.,
Petitioner,

v.

ALLAN G. CHARLES, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 20, 1988

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QUESTIONS PRESENTED

1. May a private intervening defendant who is not liable for any of the relief obtained by plaintiffs in an action under 42 U.S.C. § 1983 be held liable for payment of $254,000 in attorneys' fees pursuant to 42 U.S.C. § 1988?

2. Where no award of costs has been made against a private intervening defendant under Supreme Court Rule 50 when his appeal was dismissed, may an award of attorneys' fees be made pursuant to 42 U.S.C. § 1988 which provides that fees may be assessed only "as part of the costs"?

3. Does the imposing of such fee liability violate the First Amendment by exacting a financial penalty upon the exercise of the right of such defendant to pursue litigation aimed at the protection of constitutional liberties?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following were also parties to the proceedings in the court below: Neil F. Hartigan, Attorney General for the State of Illinois; Richard M. Daley, State's Attorney for Cook County, Illinois; Jasper F. Williams, M.D.; David K. Campbell; Marvin Rosner, M.D.; David Zbaras, M.D.; Martin Motew, M.D.; Hector N. Zevallos, M.D.; National Health Care Services of Peoria, Inc.; the Hope Clinic for Women, Ltd.; Arthur C. Watson, M.D.; and Robert C. Steptoe, M.D. All of these parties are respondents in this Court. *See generally, Diamond v. Charles*, 476 U.S. 54 (1986).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Eugene F. Diamond, M.D. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 5, 1988, and for which rehearing was denied on July 22, 1988.

OPINIONS BELOW

The May 5, 1988 opinion of the United States Court of Appeals for the Seventh Circuit, affirming, as modified, the award of attorneys fees against the petitioner is reported at 846 F.2d 1057 (7th Cir. 1988), and is reproduced in the Appendix to this Petition at App. A. A petition for rehearing, with suggestion for rehearing *in banc*, was filed on May 19, 1988. That petition was denied on July 22, 1988. A copy of that order is reproduced at App. G. The opinions of the United States Dis-

trict Court for the Northern District of Illinois are not reported but are reproduced in the Appendix to this Petition at App. F (September 28, 1984); App. E (April 22, 1985); App. D (October 21, 1985); App. C (March 6, 1986); App. B (December 5, 1986).

JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit, affirming, as modified, the district court's award of attorneys fees, was entered on May 5, 1988. A petition for rehearing *in banc* was denied on July 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 (1982) (excerpt):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 (1984) (excerpt):

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title,

> title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court Rule 50 (excerpt):

> .1 In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.
>
> .2 In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court.
>
> .6 When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the Clerk any bill of costs.

STATEMENT OF THE CASE

Petitioner Eugene F. Diamond, M.D., intervened as a defendant in this action to defend the constitutionality of the 1979 amendments to the Illinois Abortion Law of 1975. The procedural history of the underlying litigation is summarized by the opinion in *Diamond v. Charles*, 476 U.S. 54 (1986), in which this Court dismissed Dr. Diamond's appeal. This petition involves an award of attorneys' fees against Dr. Diamond currently amounting to $254,000.[1]

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[1] The total current judgment of $254,296.84 includes the court of appeals' final award of $206,428.60 plus interest, calculated to October 20, 1988, of $47,868.24, pursuant to 28 U.S.C. 1961(a) and F.R.A.P. 37. This is based on the apportioned judgment of $100,531.84 (50% of the judgment of $201,063.69 for work in the district court and court of appeals), plus interest of $36,129.40 from April 23, 1985, plus $105,896.76 awarded for the Supreme Court work ($111,778.51 judgment of December 8, 1986 minus $5,881.75

1. On October 30, 1979, respondents commenced this action for declaratory and injunctive relief against the state officials charged with enforcing the Illinois abortion law, the Illinois Attorney General, the director of the state department of public health, and the state's Attorney of Cook County. Respondents asserted their own constitutional and civil rights, as well as those of their female patients of childbearing age. *See Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980). The original named defendants were the Attorney General of Illinois, and the State's Attorney for Cook County. Dr. Diamond, and two other individuals,[2] filed a timely petition to intervene as defendants pursuant to F. R. Civ. P. 24. Like respondent physicians, Dr. Diamond, a pediatrician, asserted his own constitutional rights, as well as those of his present and potential patients. He sought intervention "both to defend the rights and interests of [his] prenatal patients as well as to protect [his] own professional and pecuniary interests placed at risk by the plaintiffs' challenge of the Act. Dr. Diamond also sought intervention as a parent of an unemancipated minor daughter of child-bearing age." *Charles v. Daley*, App. A at 3a. Over the opposition of respondents the district court granted the motion to intervene.

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reduction by court of appeals), plus interest of $11,738.84 from December 8, 1986. The figure of $254,296.84 does *not* include any supplemental petition for fees for the appeal of the fees judgment to the court of appeals.

The district court has made petitioner jointly and severally liable for the entire amount of the fees award. App. E at 80a. Thus, the court of appeals misspoke when it stated that the award is divided among the three intervening defendants. App. A at 6a-7a. Rather, Dr. Diamond and the Estate of Dr. Williams are jointly and severally liable for the entire amount; these two parties, and Mr. Campbell, are jointly and severally liable for the $100,531.84 first awarded in April, 1985. App. E at 80a.

[2] Joining Dr. Diamond as intervenors, and claiming similar justiciable interests, were Jasper F. Williams, M.D., and David K. Campbell.

The respondents were successful in obtaining a permanent injunction against many of the provisions of the abortion law. *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984). The petitioner, and his co-intervenor Dr. Williams, appealed from this judgment, and this Court noted probable jurisdiction over that appeal on May 22, 1985. *Diamond v. Charles*, 471 U.S. 1115 (1985). However, prior to this Court's noting of jurisdiction, Dr. Williams died, leaving Dr. Diamond as the sole appellant before this Court. *Diamond v. Charles*, 476 U.S. 54 (1986). This Court dismissed the appeal of Dr. Diamond for want of jurisdiction. *Id.* Pursuant to Supreme Court Rule 50, no costs were allowed to either party.

2. The initial order awarding attorneys fees in this case, entered October 1, 1984, stated that "fees and costs in the amount of $181,287.84 shall be awarded," but did not specify whether the intervening defendants were liable for any portion of the award. App. F at 82a. The intervenors filed a timely Rule 59(e) motion, asking the court to clarify that its order did not assess fees against them. The court denied this motion, and, in an order dated April 22, 1985, held that the intervening defendants were jointly and severally liable for 50 percent of the total fees awarded to respondents. The court also increased the total award to $201,063.68, reflecting approximately $20,000 in supplemental fees for work before the court of appeals on the merits. App. E.

Pursuant to a second Rule 59(e) motion, the district court further modified its April 22 order, and directed briefing on the applicability of this Court's decision in *Kentucky v. Graham*, 473 U.S. 159 (1985). App. D. On March 6, 1986, after consideration of the parties' briefs, the district court issued an order and opinion affirming its award of fees in light of *Graham*. App. C. Intervenors filed a timely notice of appeal from this decision. *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986).

While the appeal was pending, respondents filed a supplemental fee petition for work performed in the Su-

preme Court phase of the litigation. On December 5, 1986, the district court awarded additional fees of $111,778.51 against Dr. Diamond and the Estate of Dr. Williams, both of whom timely appealed. App. B. The appeals were consolidated for argument.

3. On May 5, 1988, the Seventh Circuit, in a 2-1 decision, Judge Manion dissenting, affirmed the decision of the district court awarding attorneys fees against intervenors. The majority, however, modified the district court's decision by reducing the award by approximately $5,000 for excessive and frivolous expenses.

The majority ruled on three important questions of federal law. The majority noted that even though § 1988 did not explicitly contemplate the participation of intervenors in civil rights litigation, nor specifically enumerate those against whom an award of fees may be appropriately assessed, the award against intervenors was proper because the act failed to specifically exempt any class of losing defendants from fee liability. App. A at 10a. The majority found that this Court's holding in *Kentucky v. Graham*, 473 U.S. 159 (1985), that there is no liability for fees under § 1988 absent liability on the merits, did not apply to this case. App. A at 17a-21a. Moreover, the majority held that the $106,000 award of fees for the proceedings before this Court was proper despite the fact that in dismissing petitioner's appeal on the merits, this Court did not assess costs. App. A at 26a-33a. Finally, the Court held that the fees award did not violate intervenors' First Amendment right to engage in advocacy through litigation. App. A at 34a-36a.

In dissent, Judge Manion wrote that the award of attorneys fees against intervenors was improper because respondents were not "prevailing parties" against the intervenors pursuant to § 1988. App. A at 43a. Judge Manion also wrote that *Graham*'s linking of fees liability to merits liability precluded any award of fees against the intervenors. App. A at 42a. Judge Manion concluded:

> In short, to "prevail" against a particular defendant under § 1988, a party must "prevail" on the underlying civil rights claim against that particular defendant. Plaintiffs could not and did not prevail against the intervening defendants on their underlying civil rights claim. As such, it was inappropriate for the district court to assess attorneys' fees against the intervening defendants.

App. A at 44a.

4. On May 19, 1988, intervenors filed a petition for rehearing, with suggestion for rehearing *in banc*, in the Seventh Circuit. That petition was denied on July 22, 1988. App. G.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THIS COURT WHICH MAKE LIABILITY FOR RELIEF ON THE MERITS OF THE UNDERLYING LITIGATION A PREREQUISITE TO A DEFENDANT'S LIABILITY FOR ATTORNEYS' FEES PURSUANT TO § 1988

The majority has unjustifiably extended § 1988 fees liability to parties not liable on the merits for an underlying violation of civil rights. The majority erroneously stated that "nothing in either the express language of section 1988 or in its legislative history nor pertinent case law conclusively link[s] a party's liability for substantive relief with liability for fees. . ." App. A at 26a. On the contrary, this Court has spoken decisively on the link between fees liability and merits liability. "There is no cause of action against a defendant for fees [under 42 U.S.C. § 1988] absent that defendant's liability for relief on the merits." *Kentucky v. Graham*, 473 U.S. 159, 170 (1985). *See also, Hewitt v. Helms*, 107 S.Ct. 2672 (1987) (Even where a court has stated that plaintiff's rights were violated by a defendant, fees may not be assessed against that defendant if no merits relief was obtained from him.); *Hanrahan v. Hampton*, 446 U.S.

754, 756 (1980) (A party is not a "prevailing" party "in the sense intended by 42 U.S.C. § 1988" unless it has obtained relief on the merits of its claim.); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) ("[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law.")

In clear disregard of this principle, the majority assessed § 1988 fees against private intervening defendants who, the majority acknowledged, "were not and could not themselves have been found guilty of violations of the plaintiffs' constitutional rights." App. A at 15a. Citing *Graham*, the majority further acknowledged that a party against whom "liability on the merits could not be established, is, by the express language of [§] 1988, not a party properly liable for a prevailing party's attorneys' fees." App. A at 19a, n.13. Incredibly, having acknowledged *Graham's* link between merits and fees liability, and the absence of merits liability against the petitioner, the majority "decline[d]" to apply the straightforward rules of *Graham* to this case. App. A at 21a. This attempt to treat the controlling language of *Graham* as dictum is all the more remarkable because the rule stated in *Graham* was manifestly not specific to the facts of that case.

> [L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity *or on the merits*, § 1988 does not authorize a fee award against that defendant.

473 U.S. at 165 (emphasis supplied). To suggest that *Graham's* repeated pronouncements on the scope of fees liability were not essential to this Court's holding, or that they have no bearing beyond the precise facts of *Graham*, is to misread that decision.

The majority justified its departure from *Graham* by holding that, for purposes of § 1988, the respondents "prevailed" against the petitioner. As noted by the dis-

sent, the majority's holding in this regard is in conflict with *Hewitt v. Helms*, 107 S.Ct. 2672 (1987).

> In *Helms*, the court held that "moral victories" do not entitle a person to fees as a prevailing party. To "prevail", a party must receive some relief, either through a judgment or otherwise, "*which affects the behavior of the defendant towards the plaintiff.*" 107 S.Ct. at 2676 (emphasis in original). Here, the only "relief" plaintiffs received with respect to the intervenors was the knowledge that the federal courts disagreed with the intervenors' views concerning the constitutionality of the Illinois abortion statute. This is insufficient to allow them to collect fees as "prevailing parties."

App. A at 43a. (Manion, J., dissenting). As "moral victors" over the petitioner, therefore, respondents are not prevailing parties against him.

The majority's failure to adhere to *Graham* derives from a flawed understanding of the statutory intent of § 1988. Section 1988 was enacted: (1) so that plaintiffs could vindicate federal constitutional and statutory rights, and (2) so that "those who violate the Nation's fundamental laws" may not "proceed with impunity." S. Rep. No. 1011, 94th Cong. 2nd Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910 (Hereinafter, "S. Rep."). The majority's position, that the first of these objectives is paramount to any limitations on the scope of fees liability, App. A at 12a-13a, demonstrates how far it has strayed from the intent of § 1988, and the precedents of this Court. To ignore the distinction between liable and non-liable defendants defeats the express intent of Congress that § 1988 not enact any change in the substantive liability provisions of the underlying civil rights statutes. 122 Cong. Rec. at 35122 (statement of Rep. Drinan). Under the majority's holding that fees can be awarded irrespective of liability on the merits, § 1988 is converted, contrary to legislative intent, into an independent source of financial liability

against defendants who are guilty of no wrongdoing, but are merely "guilty" of asserting claims opposed to those of a successful § 1983 plaintiff.[3]

Although the majority defended its holding by emphasizing the "unique" circumstances of this case, its error in awarding fees against innocent intervenors is plainly not limited to these facts. Indeed, on the day immediately following this judgment, the identical majority, relying in part upon its opinion in this case, assessed $180,000 in fees under Title VII, 42 U.S.C. 2000e-5(k), against the Independent Federation of Flight Attendants (IFFA), an intervenor who was not held liable for the relief obtained under Title VII. *See Zipes v. Trans World Airlines, Inc.*, 845 F.2d 434 (7th Cir. 1986), *pet. for cert. filed, Independent Federation of Flight Attendants v. Zipes*, No. 88-608 (U.S. Oct. 11, 1988).

Application of the new rule set forth by the court will have a substantial chilling effect on intervention. Both

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[3] The majority's insistence that limitations on fees liability cannot be permitted to frustrate the "overriding" purpose of compensating successful plaintiffs' counsel ignores the fact that "Congress sought to avoid making § 1988 a 'relief fund for lawyers,' " *Graham*, 473 U.S. at 168, *citing*, *Hensley v. Eckerhart*, 461 U.S. 424, 446 (Brennan, J., concurring), *quoting* 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy).

Graham aptly illustrates this principle in practice, for as a result of this Court's reversal of the $58,000 fee award, plaintiffs' counsel recovered not a single dollar of fees. 473 U.S. at 162 (noting settlement agreement that fees would be sought from Commonwealth only). Likewise, in *Marek v. Chesny*, 473 U.S. 1 (1985) this Court vacated a fee award of $171,000 due to the cost-shifting impact of F.R.Civ.P. 68. Also, in *Jeff D. Evans*, 475 U.S. 717 (1986), this Court held that § 1988 was not violated by a court-approved class action settlement which granted plaintiffs substantially all of the relief they sought on the merits, in return for a waiver of all fees liability. This Court noted that in enacting § 1988, "Congress specifically rejected a mandatory fee-shifting provision," 475 U.S. at 731, n. 22, a proposal which the majority, like the court of appeals in *Jeff D.*, would "effectively reinstate under the guise of carrying out the legislative will." *Id.*

private individuals and public interest advocacy groups will be subjected to financial penalties for asserting their own rights and interests.[4] Such intervention, often assists courts in sharpening the legal issues presented, and its salutary effects will be lost.

The Seventh Circuit's drastic departure from this Court's careful delineation of the relationship between fee liability and merits liability expands fee liability under § 1988 far beyond that envisioned by Congress. It also undermines the goals of intervention, not only pursuant to Rule 24 of the Rules of Civil Procedure, but also pursuant to all other statutory grants of intervention in cases where fee-shifting statutes are applicable. Thus, the court's decision stands to upset the delicate balance struck by Congress between the benefits to society and the judicial system derived from intervention, and those derived from awards of attorneys' fees. Such important questions of federal law were to be resolved by Congress, not the courts.

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[4] Such intervention is not uncommon, and, ironically, is often utilized by those who would, in other contexts, find themselves as plaintiffs. *See e.g., Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525 (9th Cir. 1983) (intervention granted to National Audubon Society, *et al.,* to support Secretary of the Interior in establishment of conservation area); *Washington State Bldg. and Constr. Trades Council v. Spellman,* 684 F.2d 627 (9th Cir. 1982) (intervention granted to Don't Waste Washington, Inc. to support state initiative restricting importation of nuclear waste); *Idaho v. Freeman,* 625 F.2d 887 (9th Cir. 1980) (intervention granted to National Organization for Women (NOW) to support General Services Administration (GSA) in challenge to procedures for ratification of the Equal Rights Amendment).

II. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

The majority's decision also establishes a conflict among the federal circuits on the question of whether parties who are not liable for merits relief in civil rights litigation can be held liable for an award of fees.

The Second Circuit, in *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2d Cir. 1984) held that a named defendant who was immune from liability under 42 U.S.C. § 1983 could not be held liable for fees under § 1988. *Annunziato* specifically rejected the premise, relied upon by the majority here, that the increased work caused by the advocacy of a non-liable defendant can subject that defendant to § 1988 fees liability.

> [A]bsent proof that The Gan violated plaintiffs' constitutional rights, or knowingly acted in concert with a state actor that did, The Gan, as a private party, cannot be held liable for attorneys fees under § 1988. *This is so even though The Gan's participation in the litigation may have served to increase the amount of fees generated by plaintiffs' counsel.*

744 F.2d at 254 (emphasis supplied). *Annunziato* is not distinguishable, as the majority contended, on grounds that the petitioner here "volunteered" to participate in the litigation. App. A at 16a, n.11. The principle that fees liability must be premised upon merits liability should apply regardless of whether the innocent defendant is named by the plaintiff or intervenes to protect constitutional values and interests. The defendant's presence as an advocate does not, standing alone, "form a proper basis for . . . subjecting [the defendant] to fee liability under § 1988." *Id.* at 254.

In *Glover v. Alabama Department of Corrections*, 776 F.2d 964 (11th Cir. 1985), the Eleventh Circuit held that fees could not be awarded against the State of Alabama in

a personal capacity suit under 42 U.S.C. § 1983, despite the fact that the state had represented the defendants at trial and on appeal. *Glover v. Alabama Department of Corrections*, 734 F.2d 691, 695 (11th Cir. 1984). The Eleventh Circuit, in deference to *Graham*, correctly recognized that liability for fees cannot exist under § 1988 in the absence of liability on the merits.

In addition, there is a split within the Sixth Circuit on the precise question of whether § 1988 fees may be awarded against private parties who have intervened to defend state or municipal regulations on abortion. *Compare Wolfe v. Stumbo*, No. C-80-0285 (W.D. Ky., Dec. 15, 1983) and *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn., Dec. 23, 1981) (both denying § 1988 fees on ground that merits liability was not established against intervenors) *with Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984) (awarding five percent of total fee award against intervenors).

This Court should grant certiorari to resolve this conflict among the federal circuits on the relationship between merits liability and § 1988 fees liability.

III. THE COURT OF APPEALS DECIDED TWO IMPORTANT FEDERAL QUESTIONS WHICH HAVE NOT YET BEEN SETTLED BY THIS COURT

A. This Court Has Not Yet Decided Whether An Award of Attorneys' Fees Pursuant to § 1988 May Be Made in the Absence of an Award of Costs

Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs.*" 42 U.S.C. 1988 (1982) (emphasis supplied). Upon dismissal of petitioner's appeal on the merits, no costs were allowed to the respondents, in accordance with the cost-shifting provisions of Rule 50 of this Court. *Diamond v. Charles*, 476 U.S. 54 (1986). Despite this fact and the court's

recognition that "section 1988 ties attorneys' fees directly to an award of costs," the court affirmed an award of fees in excess of $100,000 against petitioner for work before this Court. App. A at 31a, n. 25. As the court noted, whether an award of attorneys' fees pursuant to § 1988 is precluded by the absence of an award of costs is a novel question which "has not been previously raised before the [Supreme] Court." App. A at 28a.

This Court's decision in *Marek v. Chesney*, 473 U.S. 1 (1985), although not directly controlling, is instructive on this point. In *Marek*, this Court reversed a fee award of $171,000 to successful civil rights plaintiffs because F.R. Civ. P. 68 rendered the plaintiffs ineligible for costs.

> [S]ince Congress expressly included attorney's fees as "costs" available to a plaintiff in a Section 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This 'plain meaning' interpretation of the interplay between Rule 68 and Section 1988 is the only construction that gives meaning to each word in both Rule 68 and Section 1988.

473 U.S. at 9. In like manner, such awards of fees should be subject to the cost-shifting provision of Rule 50.

According to the majority, the failure of Rule 50 to allow costs is an extraordinary circumstance which should not be allowed to defeat respondents' entitlement to fees. App. A at 32a. *Marek*, however, suggests otherwise: In the absence of clear Congressional intent to exempt § 1988 from the cost-shifting limitations of Rule 50, the "costs" clause of § 1988 must be given full effect.

In holding that an award of fees may be made in the absence of an award of costs, the majority has established a new rule which is applicable to all fee-shifting statutes which tie fees to costs. The appendix to Justice Brennan's opinion in *Marek* lists over 60 such statutes. 473 U.S. at 43-44. Whether an award of fees in the absence of an award of costs may be made pursuant to a fee-

shifting statute such as § 1988 which specifically ties such awards to awards of costs is an important question which should be resolved by this Court.

B. This Court Has Not Decided Whether Penalizing Intervening Defendants Who Have Not Violated the Rights of Plaintiffs by Assessing Fees Against Them Violates Their First Amendment Rights

The construction of § 1988 adopted by the majority threatens a severe violation of the petitioner's right to litigate as a means of political expression. *NAACP v. Button*, 371 U.S. 415 (1963). As this Court stated in *In re Primus*, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." 436 U.S. 412, 426 (1978). This Court emphasized in *Button* that this right must be equally extended to all public interest litigants, regardless of how well or poorly their legal arguments fare in court:

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. *The course of our decisions in the First Amendment area makes plain that its protection would apply as fully to those who would arouse our society against the objectives of the petitioner.* For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Button, 371 U.S. at 444-445 (emphasis supplied).

Awarding attorneys' fees against innocent private parties who act to defend governmental action effectively penalizes the speech of such parties on the basis of content. Such a scheme offends the core principles of *Button*,

and constitutes a particularly virulent form of viewpoint based discrimination, for it subsidizes the litigation activity of public interest plaintiffs out of the pockets of their public interest opponents. Between parties with competing constitutional claims, neither of which has violated any civil rights laws, *all* of the risk of attorneys fees is borne by those who happen to be in the posture of defense, while *none* of the risk falls upon those who find themselves as plaintiffs. Just as the majority refused to consider the fee award as a "sanction," it refused to acknowledge the imbalance of risk which its view of § 1988 would impose upon prospective intervening defendants.

The threat posed by this $254,000 fee award to petitioner's constitutional rights is palpable. The award bears no relation to any violation of civil rights by petitioner, but is made simply because petitioner has intervened and litigated on behalf of constitutional claims that did not prevail. The right to litigate such claims, which the majority acknowledged, is empty indeed if such advocacy can be sanctioned by daunting fee awards. It is difficult to imagine, to use the language of the majority, a more "specific and admittedly severe restriction[] on the ability of counsel to locate and recruit potential litigants." App. A at 35a *See* Goldberger, *First Amendment Constraints on the Award of Attorney's Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer*, 47 Ohio St. L.J. 603 (1986).

In *National Labor Relations Board v. Catholic Bishop of Chicago*, this Court held that before determining whether a particular construction of an Act of Congress was unconstitutional, it must first identify whether that construction is based upon "the affirmative intention of the Congress clearly expressed." 440 U.S. 490, 500 (1979). In enacting § 1988, Congress expressed no such clear intention to permit the award of fees against innocent intervening defendants. *Graham* holds that the

intention of Congress was precisely the opposite; only those who are liable for relief on the merits may be held liable for fees. Accordingly, the court of appeals should not have reached this question. However, having done so, the question is squarely before this Court. If it is to be resolved, it should be resolved by this Court.

CONCLUSION

A writ of certiorari should issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 86-1552, 86-3137

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs-Appellees,
v.

RICHARD M. DALEY, State's Attorney of Cook County, Illinois, *et al.*,
Defendants,
and

EUGENE F. DIAMOND, M.D., ESTATE OF JASPER F. WILLIAMS, M.D., and DAVID K. CAMPBELL,
Intervening Defendants-Appellants.

Argued April 23, 1987

Decided May 5, 1988

Colleen K. Connell, Roger Baldwin Found. of ACLU, Inc., Chicago, Ill., for plaintiffs-appellees.

Edward R. Grant, Chicago, Ill., for intervening defendants-appellants.

Before CUMMINGS, COFFEY and MANION, Circuit Judges.

COFFEY, Circuit Judge.

Intervening defendants-appellants (hereinafter "intervenors") appeal from two orders of the district court

awarding plaintiffs-appellees ("plaintiffs") an aggregate sum of $312,842.20, of which $212,310.35 was assessed against various intervenors, as costs and attorneys' fees pursuant to 42 U.S.C. § 1988. The litigation underlying the district court's fee award involves the plaintiffs' nearly six-year battle in the district court, this court and the Supreme Court against the intervenors and various governmental officials of the State of Illinois to set aside S.B. 47, the Illinois Abortion Act of 1975, enacted as amended October 30, 1979. This case presents an issue of first impression in this circuit: Whether private intervening parties who have not been found liable for a violation of plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983, may nevertheless be held liable for an award of attorneys' fees under 42 U.S.C. § 1988.[1] We affirm the assessment of costs and fees against the intervenors but adjust downward the fees imposed by the district court for the Supreme Court phase of this litigation

I. FACTS

The plaintiffs in this action are Illinois physicians who provide a full range of family planning services including abortions, to their patients. On October 30, 1979, the

[1] Apparently, the only other federal appellate court to address the issue of intervenor fee liability under section 1988 is the Eleventh Circuit in *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987). Although *amicus curiae*, the Catholic League for Religious and Civil Rights, raised the arguments advanced in *Reeves*, neither party cited the case in its briefs nor advanced the argument adopted therein by the Eleventh Circuit—that intervening defendants seeking themselves to vindiate counter-vailing constitutional rights (so-called "functional plaintiffs") should not be held liable for fees unless their claims are frivolous. *Id.* at 1484. We will postpone our consideration of the "functional plaintiff" argument until the issue is raised by actual parties to litigation who, in the context of our adversary system, will possess the incentive to thoroughly explore and analyze the strengths and weaknesses of the Eleventh Circuit's decision in *Reeves*.

plaintiffs brought suit under 42 U.S.C. § 1983 challenging the constitutionality of the Illinois Abortion Act on behalf of their female patients. The Act was an attempt by the state legislature to comprehensively regulate the practice of performing abortions and included provisions subjecting physicians to criminal prosecution for violations of what this court previously termed its "daedalian" prescriptions. *See Charles v. Carey*, 627 F.2d 772, 775 (7th Cir. 1980) (Pell, J.). The plaintiffs sought injunctive and declaratory relief against those Illinois officials charged with implementing and enforcing the Act—the Illinois Attorney General, the Director of Illinois' Department of Public Health and the State's Attorney of Cook County, who was sued both in his official capacity and as a representative of the defendant class of all Illinois State's Attorneys. On October 31, 1979, the district court granted plaintiffs' motion for a temporary restraining order barring enforcement of the entire Act as amended.

Within days of the entry of the district court's restraining order, intervenors Eugene Diamond, M.D., Jasper F. Williams, M.D., and David Campbell moved to intervene in the lawsuit as defendants. Doctors Diamond and Williams sought intervention both to defend the rights and interests of their prenatal patients as well as to protect their own professional and pecuniary interests placed at risk by the plaintiffs' challenge of the Act. Dr. Diamond also sought intervention as a parent of an unemancipated minor daughter of childbearing age. Campbell sought to intervene based upon his status as the spouse of a woman of childbearing age. The plaintiffs strenuously opposed the intervenors' motion to intervene on the grounds that the intervenors lacked any legally cognizable interest in the litigation and alternatively that participation as *amici curiae* would suffice to protect those interests posited by the intervenors. Notwithstanding the plaintiffs' objections, however, the district court

granted the motion to intervene. In the meantime, the intervenors were granted leave to file their own Answer, a Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, and other documents.

On November 16, 1979, the district court granted in part the plaintiffs' motion for a preliminary injunction against enforcement of several of the Act's provisions. The intervenors and governmental defendants appealed from the district court's ruling and the plaintiffs cross-appealed. On appeal, this court affirmed the district court's preliminary injunction; we also directed, as the plaintiffs had requested, that enforcement of several additional statutory provisions be preliminary enjoined. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

On remand, the district court subsequently enjoined the operation of additional provisions of the Act, but the court deferred ruling on the plaintiffs' motion to enjoin use of the remainder of the Act pending the Supreme Court's decision in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). In the wake of the Court's decision in *Akron*, the district court reconsidered the plaintiffs' motion and preliminarily enjoined enforcement of several additional, but still not all, of the provisions of the Act. *Charles v. Carey*, 579 F.Supp. 377 (N.D.Ill. 1983). By the time proceedings in the district court were concluded, the court had permanently enjoined enforcement of twenty-five sections of the Act, including its primary operative provisions *See Charles v. Carey*, 579 F.Supp. 464 (N.D. Ill.1983).

The intervenors, together with the Illinois Attorney General and State's Attorney Daley, immediately appealed the issuance of the permanent injunction, but only with respect to three key sections of the Act The plaintiffs cross-appealed, alleging that the district court erred in finding constitutional a previously disputed sec-

tion of the Act. Once again, the intervenors were dealt another setback; we affirmed the permanent injunction of the three sections already enjoined and also held the fourth section unconstitutional. *Charles v. Daley*, 749 F.2d 452 (7th Cir.1984).

Following their second defeat before this court, intervenors Diamond and Williams filed both a notice of appeal and a jurisdictional statement with the Supreme Court on February 28, 1985. Neither the Illinois Attorney General nor State's Attorney Daley joined in these submissions. The Supreme Court granted review and the case was fully briefed and argued on November 5, 1985. Subsequently in *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), the Court dismissed the appeal concluding that absent the participation of the governmental defendants, Doctor Diamond lacked standing to prosecute the appeal.[2] This court's decision in *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), thus stands as the final word on the constitutionality of the amended Illinois Abortion Law of 1975.

Our recapitulation of the procedural posture of this case notwithstanding, this appeal does not concern the merits of the previous litigation; rather, we are concerned only with the propriety of the district court's award of fees to the plaintiffs for expenses they incurred throughout the protracted course of this lawsuit. On two separate occasions, pursuant to 42 U.S.C. § 1988, the plaintiffs filed petitions for an award of attorneys' fees and costs for work performed in the district court. Neither petition specifically sought fees and costs from the intervenors. The Illinois Attorney General filed a response to the plaintiffs' petition, as did State's Attorney

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[2] After the notice of appeal was filed, but prior to oral argument of the case, Dr. Williams died. No one was substituted for him as a party pursuant to Supreme Court Rule 40. *See* n. 22, *infra*. Mr. Campbell did not join the appeal of the case to the Supreme Court.

Daley; neither defendant raised the issue of the intervenors' liability for fees. Eventually, the district court issued an order awarding $181,287.84 in attorneys' fees and costs to the plaintiffs as "prevailing parties"; nowhere, however, did the order specify whether or not the intervenors as well as the governmental defendants were jointly liable for the plaintiffs' fees and costs. Instead, the order simply stated, "Fees and costs in the amount of $181,287.84 shall be awarded."

The intervenors subsequently filed a motion in the district court under Federal Rule of Civil Procedure 59(e) to clarify the district court's earlier order concerning their liability for fees and costs. The intervenors asserted that they could not properly be held liable for the plaintiffs' costs and fees and that the judgment should be amended to reflect the governmental defendants' sole liability. The district court ordered all parties to brief the question of intervenor liability. On April 22, 1985, the district court issued a new order expressly finding all three intervenors liable for fees due to their role as "fully participating parties in the lawsuit" and apportioning their liability at one-half of the total amount of fees awarded to the plaintiffs. In addition, the court increased its award of fees by $19,775.85 to $201,063.69, in accordance with the plaintiffs' supplemental petition for fees on appeal. The intervenors' share of fee liabiilty was therefore assessed initially at $100,531.84.

Pursuant to a second Rule 59(e) motion by the intervenors, the district court amended its order of April 22, 1985 to correct a clerical error which improperly included among the intervening parties their counsel, the Americans United for Life Legal Defense Fund. The district court also directed the parties to brief the applicability of the recently decided case of *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), on the issue of the intervenors' fee liability. After considering the parties' briefs addressing the relevance of *Graham*,

the district court issued an order affirming its April 22 decision awarding district court and appellate fees against each of the intervenors, Campbell, Williams, and Diamond. The intervenors filed a timely notice of appeal. *See Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986).

Finally, on July 14, 1986 and August 4, 1986, the plaintiffs filed supplemental motions in the district court for attorneys' fees arising out of the Supreme Court phase of the litigation. A barrage of replies and surreplies ensued, and on December 5, 1986, the district court entered judgment against Doctors Diamond and Williams, awarding the plaintiffs $111,778.51 as fees for their appeal to the Supreme Court. The intervenors also timely appealed from this second award of attorneys' fees and we have consolidated both appeals inasmuch as they arise from the same underlying dispute and involve virtually identical legal arguments. At issue in these cases are separate judgments totalling $89,399.87 against intervenors Diamond and Williams and a judgment of $33,510.61 against intervenor Campbell.

II. DISCUSSION

On appeal, the intervenors challenge both the propriety of the fee awards entered against them pursuant to 42 U.S.C. § 1988 and the reasonableness of the fees imposed in connection with the argument of the case before the Supreme Court.[3] Initially, the intervenors argue that the fee award against them under section 1988 arising out of the district court and appellate proceedings that have been conducted to date is inappropriate because they were not found to have violated any of the plaintiffs' constitutional rights, rather, they merely sought, along with the governmental defendants to uphold the constitutional-

[3] Intervenors do not challenge the reasonableness of the fees imposed by the district court for the proceedings there or on appeal to this court.

ity of the state abortion statute. Second, the intervenors assert that the award of fees against them stemming from the Supreme Court phase of the litigation is similarly improper because section 1988 makes fees awardable only "as part of the costs" and the Supreme Court, in dismissing the intervenors' appeal for lack of standing, did not award costs to the plaintiffs. Third, the intervenors contend that an award of fees against them arising out of *any* of the proceedings in this lawsuit violates their First Amendment rights to participate in litigations as a means of political expression. Fourth, and finally, the intervenors maintain that even assuming *arguendo* that the award of Supreme Court fees against them was proper, the amount of fees and costs imposed was both unreasonable and excessive. We address these arguments in turn.

A. *The Intervenors' Liability for Section 1988 Fees Resulting From Litigation in the District Court and the Court of Appeals*

Fee shifting statutes, while far from unique,[4] represent explicit, congressionally-fashioned exceptions to the general rule—commonly known as the "American Rule"—that each party to a legal dispute is responsible for payment of its own attorneys' fees incurred prior to or during litigation, regardless of the outcome of the suit in the courts. *See e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed. 2d 475 (1967). In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612; 44 L.Ed.2d 141 (1975), the Supreme Court held that with three very narrow exceptions, none of which is applicable

[4] An appendix to Justice Brennan's dissenting opinion in *Marek v. Chesny*, 473 U.S. 1, 43-51, 105 S.Ct. 3012, 3035-39, 87 L.Ed.2d 1 (1985), includes a list of 120 different fee-shifting statutes. The list does not purport to be exhaustive.

here,[5] federal courts lack the inherent power or authority to award attorneys' fees to a prevailing party unless an act of Congress expressly so provides. *Id.* at 269, 95 S.Ct. at 1627. Section 1988 of Title 42 of the United States Code, the statute with which we are presently concerned, is just such an exception to the American Rule and, in fact, was enacted in 1976 as a direct consequence of the *Alyeska* decision. *See* H.R. Rep. No. 1558, 95th Cong., 2d Sess. at 2; *see also* S.Rep. No. 1101, 94th Cong., 2d Sess. at 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News, p. 5908. Despite requiring congressional authorization for judicial fee-shifting, the Court in *Alyeska* reaffirmed its earlier holding in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968),[6] that where Congres has so provided, an award of attorneys' fees should *ordinarily* be made to the successful plaintiff absent exceptional circumstances. *Id.* at 402, 88 S.Ct. at 966; *Alyeska*, 421 U.S. at 262, 95 S.Ct. at 1624.[7]

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[5] The three exceptions include the historical power of a court of equity "to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Alyeska*, 421 U.S. at 257, 95 S.Ct. at 1621. The other exceptions involve situations where courts, as part of their inherent power to police those practicing before them, may award attorneys' fees against parties for willful disobedience of court orders or because of vexatious conduct amounting to bad fiath. *Id.* at 258, 95 S.Ct. at 1622.

[6] Although *Newman* involved the fee-shifting provisions of Title II of the Civil Rights Act of 1964, the House Report on section 1988 explicitly refers to language in *Alyeska* which endorses the presumption stated in *Newman*. See H.R. Rep. No. 1558 at 2. The Senate Report on section 1988 contains a similar reference to *Newman*, *see* S.Rep. No. 1011 at 4, 1976 U.S. Code Cong. & Admin. News at 5911.

[7] The intervenors do not point to the existence of any such "exceptional circumstances" in this case.

In seeking to determine whether Congress intended to authorize the award of fees to the plaintiffs and against the intervenors in the instant case, we begin our analysis with the language of section 1988 itself. *See Meredith v. Bowen*, 83 F.2d 650, 654 (7th Cir.1987) (plain language of a statute is the best evidence of its meaning). Entitled "Proceedings in vindication of civil rights; attorney's fees," secton 1988 provides in relevant part:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Had plaintiffs named only state officials as defendants in their section 1983 action, they would, as prevailing parties, have been presumptively entitled to attorneys' fees from the defendants. The presence of private intervening parties, however, may alter this result because section 1988 neither explicitly contemplates the participation of intervenors in civil rights litgaton nor specfically enumerates those against whom an award of fees may be appropriately assessed.

The intervenors state correctly that they could not properly have been named as defendants in the plaintiffs' section 1983 action, which alleged violations of constitutional rights performed "under color of state law." *See* 42 U.S.C. § 1983. It follows logically, according to the intervenors, that because the constitutional injuries sustained by the plaintiffs were the direct result of Illinois' passage of its abortion statute, the intervenors cannot be held liable for attorneys' fees incurred by the plaintiffs in challenging the constitutionality of the state law. In support of their position, the intervenors point both to the absence of any language in section 1988 making private intervening parties potentially liable for at-

torney fee awards as well as to Supreme Court precedent, most notably *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). *Graham* is purported to be consistent with the view that only those parties actually found liable for the relief sought by civil rights plaintiffs may be held liable for plaintiffs' attorneys' fees. The plaintiffs, on the other hand, contend that "prevailing party" status, and not liability for relief on the merits, is the *sine qua non* for an award of attorneys' fees under section 1988. Imposing liability for fees on intervenors, the plaintiffs maintain, is not only in keeping with the legislative intent of Congress in enacting section 1988 but is also in accord with the district court decision in the virtually identical case of *Akron Center for Reproductive Health v. City of Akron*, 604 F.Supp. 1268 (N.D.Ohio 1984). In that case, upon remand from the Supreme Court, the district court assessed plaintiffs' attorneys' fees in part against private intervening defendants.

If section 1988 unequivocally prescribed all those against whom attorneys' fees could be imposed, our task would be simple; unfortunately, as even the Supreme Court has recently recognized, section 1988 does not specify with particularity those who may be called upon to shoulder its fee awards. *See Graham*, 473 U.S. at 164, 105 S.Ct. at 3104-05. Consequently, we must resort to section 1988's legislative history in an effort to determine those against whom such awards may operate. As the intervenors correctly observe, examination of the legislative history of section 1988 reveals two primary objectives which Congress hoped to promote: first, to encourage private citizens to initiate court action to correct violations of the Nation's civil rights statutes, *see* H.R. Rep. No. 94-1558 at 1; and second, to insure that those who violate the Nation's fundamental laws do not proceed with impunity, *see* S.Rep. No. 94-1011 at 2, 1976 U.S.Code Cong. & Admin.News at 5909. However, although punishment and deterrence are undeniably im-

portant purposes of section 1988, the House and Senate Committee Reports leave us convinced that section 1988's overriding goal was to reimburse with a reasonable attorneys' fee those who as "private attorneys general" take it upon *themselves* to invoke and thereby invigorate federal constitutional and statutory rights.[8]

Thus, while it is true that neither section 1988 nor its legislative history exhaustively categorizes those potentially liable for fee awards, both the statute and the House and Senate Reports that preceded its enactment fail specifically to exempt any class of losing defendants from fee liability. In fact, given the conscious decision by Congress to effectuate the enforcement of the civil rights laws primarily by providing attorneys' fee awards as an incentive to private civil rights plaintiffs, it is both consistent with and in furtherance of section 1988's purpose to interpret the statute to encompass the fee liability of unsuccessful intervening parties. We therefore agree with the plaintiffs that because section 1988's paramount concern was to fashion the parameters of *eligibility* for fee awards, rather than to fix with precision the bounds

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[8] The House Report on section 1988 states in part:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right . . .

H.R.Rep. No. 1558 at 1. The Senate Report is equally explicit in its recognition of the role played by private enforcement of civil rights statutes:

> . . . All of [the] civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S.Rep. No. 1011 at 2, 1976 U.S.Code Cong. & Admin.News p. 5910.

of *liability* for such awards, the critical distinction for purposes of fixing fee liability in the somewhat atypical circumstances presented in this case is between prevailing and non-prevailing plaintiffs; it is not, as the intervenors argue, the distinction between intervening defendants found liable for substantive relief on the merits and intervening defendants not held liable for such relief.

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court directed that a party seeking attorneys' fees pursuant to section 1988 be deemed "prevailing" if he or she "succeeds on any significant issue which achieves some of the benefit plaintiff sought in bringing suit." *Id.* at 433, 103 S.Ct. at 1939; *see also Zabkowicz v. West Bend Co.*, 789 F.2d 540, 548 (7th Cir.1986). With respect to the litigation underlying the instant appeal, the plaintiffs certainly qualify as prevailing parties under the *Hensley* test. In the words of the district court:

> Due to [the plaintiffs'] efforts, the great bulk of Illinois' lengthy and complex omnibus abortion law was declared unconstitutional and permanently enjoined. The state legislature also amended an important provision of the law after plaintiffs had succeeded in obtaining a preliminary injunction against the original language. These accomplishments easily meet the 'generous' accepted formulation for a prevailing party.

(Footnotes omitted) (Mem.Op., September 28, 1984 at p. 2). The intervenors, as they must, concede that the plaintiffs prevailed against the governmental defendants, but assert that since Illinois alone was in a position to furnish the plaintiffs with the relief they sought, the plaintiffs can only recover attorneys' fees from the governmental defendants—the parties *directly* responsible for the plaintiffs' constitutional injuries. We reject the intervenors' interpretation of section 1988 for it erroneously presupposes that the statute flatly precludes

fee awards against private intervenors; in our view, such an interpretation represents too facile an approach to the central question: Did the plaintiffs in fact prevail *against the intervenors?*

In analyzing this question, we cannot and refuse to ignore the fact that the intervenors' unilateral decision, one week after the plaintiffs filed suit, to join with the state defendants in adamantly defending the constitutionality of the Abortion Act rendered them full-fledged parties to the lawsuit and entitled them to participate independently in all phases of the litigation. Indeed, the district court expressly found that the intervenors adopted the posture of "fully participating parties . . . argu[ing] every issue with vigor equal to, or greater than the efforts of the state defendants." (Mem.Op., April 22, 1985 at p. 3). Furthermore, throughout these proceedings, both in the district court and on appeal to this court, the state defendants time and again have adopted as their own the briefs, motions, and other opposing papers filed by the intervenors[9] who, for all practical purposes, were their alter ego—a fact borne out by

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[9] So far as we are able to discern, the following submissions by the intervenors were adopted by some or all of the governmental defendants: (1) the intervenors' Motion to Strike, filed November 9, 1979; (2) the intervenors' Motion and Brief in Support of Summary Judgment, filed July 9, 1982; and (3) the intervenors' brief in response to the Supreme Court's decision in *Akron*, filed July 29, 1983. The intervenors were the exclusive movants for reconsideration of the district court's preliminary injunction with respect to §§ (4) and (10) of the abortion statute, filed on November 11, 1979. Furthermore, in the initial appeal of this case to this court, the intervenors filed for themselves and on behalf of all defendants a petition and memorandum requesting *en banc* consideration of our decision directing the district court to enjoin an additional section of the statute. *See Charles v. Carey*, 627 F.2d at 790. Finally, neither governmental defendant filed a brief in defendants' second appeal to this court, *Charles*, 749 F.2d 452, but rather adopted as their own the brief filed by the intervenors and permitted the intervenors to present the only oral argument in the case.

the intervenors' ultimate decision to appeal the case to the Supreme Court despite the State of Illinois' reluctance to so proceed. And finally, putting to one side the plaintiffs' victory with respect to the overall outcome of the underlying litigation—the setting aside of substantially the entire abortion statute—we consider it particularly relevant that the plaintiffs have prevailed against the intervenors with respect to each and every section of the abortion statute in which the intervenors claimed to have had interests separate and distinct from those asserted by the state defendants.[10]

Consistent with the intent of Congress, the test for a prevailing party must be one that does not exalt form over substance; the record in this case establishes that the plaintiffs have consistently prevailed on the merits of each of the substantive issues in dispute. Thus, notwithstanding the fact that the intervenors were not and could not themselves have been found guilty of violations of the plaintiffs' constitutional rights, the foregoing facts amply demonstrate the reasonableness of the district court's conclusion that "plaintiffs can be fairly said to have prevailed equally against both parties—the State defendants *and* the intervenors" (emphasis supplied). (Mem. Op., April 22, 1985 at pp. 3-4.[11]

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[10] For example, the challenged sections of the Abortion Act requiring mandatory parental and spousal notification were permanently enjoined and declared unconstitutional as were two key sections of the law attempting (1) to protect the fetus from the imposition of "organic pain" during abortion and (2) to provide for the preservation of the fetus' life notwithstanding the woman's decision to abort.

[11] Both the intervenors and the dissent cite *Hewitt v. Helms*, —— U.S. ——, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), for the proposition that the plaintiffs in this case did not "prevail" for purposes of section 1988 because they failed to obtain any relief "*which affects the behavior of the defendant towards the plaintiff.*" *Id.*, 107 S.Ct. at 2676 (emphasis in original). While such language from *Helms* is quoted accurately, it was intended by the

Not surprisingly, both the plaintiffs and the intervenors refer us to case law which each side claims to

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Supreme Court, in considering whether Helms had sufficiently "prevailed," to point up the obvious difference between obtaining a "judicial pronouncement," as the plaintiffs did in this case, and merely generating what amounts to an advisory opinion, as Helms' litigation did. Thus, *Helms* cannot fairly be read as a general statement on the circumstances under which a losing civil rights defendant, let alone an unsuccessful intervening defendant, may be held liable for section 1988 fees. Furthermore, the precise question at issue in *Helms*, "whether a party who litigates to judgment and *loses on all of his claims* can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees," *id.* at 2674 (emphasis supplied), is far removed from the facts of this case. Here, the plaintiffs successfully litigated literally every substantive issue raised during the course of the lawsuit; hence, there can be no doubt as to whether they "prevailed" and whether, in turn, they are eligible for an award of fees.

Annunziato v. The Gap, Inc., 744 F.2d 244 (2d Cir. 1984), upon which the dissent also relies, presents a far less compelling case for the imposition of section 1988 fees than the situation with which we are here confronted. In marked contrast to the intervenors in the case at bar, the defendant in *Annunziato*, a non-state actor, was "an innocent third party caught in the cross-fire between the plaintiffs and the [defendant]. . . ." *Id.* at 253. Furthermore, the plaintiffs in *Annunziato* refused to allow the non-governmental and arguably blameless defendant to withdraw from the suit. In our case, the intervenors voluntarily thrust themselves into the lawsuit and rather than attemping to minimize their participation in the litigation, tenaciously engaged the plaintiffs in a protracted and costly court battle to an extent that even the governmental defendant, the State of Illinois, was unprepared to go. Were we to hold, as would the dissent, that section 1988 absolutely precludes the imposition of fee liability against the intervenors, from whom could the plaintiffs then recover the more than $100,000 in attorneys' fees they incurred in defending their judgment before the Supreme Court against an appeal filed and prosecuted *solely* by the intervenors? (An appeal, we hasten to add, that the Court unanimously voted to dismiss due to the intervenors' lack of standing.) We respectfully submit that to leave the plaintiffs to bear their own attorneys' fees under these circumstances would effectively eviscerate the intent of Congress in enacting section 1988.

support, directly or by analogy, its position on the fee liability of "innocent" intervening parties—those guilty themselves of no violation of federal law. The intervenors rely chiefly on the recent Supreme Court case of *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), for the proposition that, "[t]here is no cause of action against a defendant for fees [under section 1988] absent that defendant's liability for relief on the merit[s]." *Id.* at 170, 105 S.Ct. at 3108. In *Graham*, the plaintiffs brought suit under section 1983 alleging deprivations of their federal rights as the result of the use of excessive force employed against them by state police officers during a raid and subsequent arrest. The plaintiffs' lawsuit sought money damages from defendant Commissioner of the Kentucky State Police "individually and as Commissioner" but only attorneys' fees from the Commonwealth of Kentucky. The district court dismissed the State of Kentucky as a party to the plaintiffs' suit due to its Eleventh Amendment immunity from damages actions brought in federal court, *see Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); but after the action was eventually settled during trial, the plaintiffs nevertheless moved to recover their attorneys' fees from the state. The district court awarded the plaintiffs fees and the Sixth Circuit affirmed. *Graham v. Wilson*, 742 F.2d 1455 (6th Cir. 1984). The Supreme Court granted certiorari and reversed, holding that section 1988 did not permit fee liability to be imposed upon a governmental entity where the prevailing plaintiff sued government employees in their personal capacity only. Kentucky's constitutional immunity aside, the Court reasoned that to permit the plaintiffs in *Graham* to recover fees against the State as a result of prevailing against state employees in their personal capacity would also destroy the important distinction between personal and public capacity suits main-

tainable against governmental officials.[12] Such a result would be contrary to the Court's earlier holding in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that *respondeat superior* liability is not available to plaintiffs in actions brought under 42 U.S.C. § 1983. From the outset, the Eleventh Amendment prevented Kentucky from being a proper party to the plaintiffs' lawsuit; consequently, an award of section 1988 fees in favor of the plaintiffs and against the state was impermissible. As the Court concluded, "[t]hat a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a non-party." *Graham*, 473 U.S. at 168, 105 S.Ct. at 3106.

The intervenors seek to analogize their position in the instant case to that of the state of Kentucky in *Graham*, arguing that they should not have section 1988 fees assessed against them, as they, like Kentucky, were found not to be responsible for the relief sought and eventually obtained by the prevailing plaintiffs. In addition, the intervenors argue that *Graham* should be read broadly for the proposition that, so far as fee liability pursuant to section 1988 is concerned, ". . . liability on the merits and responsibility for fees go hand in hand, where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant."[13] *Id.* at

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[12] On this very point, the Court in *Graham* stated:

> Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity the ultimate insurer.

473 U.S. at 168, 105 S.Ct. at 3107.

[13] The intervenors' briefs are replete with quotations from *Graham* to support the notion that a party's liability for relief is an absolute prerequisite to liability for section 1988 fees. For example, the intervenors rely heavily upon the following language: "[I]t is clear that the logical place to look for recovery of fees is to the

165, 105 S.Ct. at 3105. We are unpersuaded both that *Graham* is sufficiently analogous to the instant case to shield the intervenors from fee liability and that the Supreme Court's holding in *Graham* is properly applicable to cases, such as this one, that are factually, and in other material respects, distinguishable.[14]

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losing party—the party legally responsible for relief on the merits." *Id.* at 164, 105 S.Ct. at 3104. Of course, in *Graham*, as the result of the operation of the Eleventh Amendment, there was only one party to whom the plaintiffs could legitimately look for fees and that party, sued in his personal capacity, also happened to be the party from whom the plaintiffs ultimately did obtain relief—albeit not in the form of a formal judgment but rather in the form of a settlement. *See Hewitt v. Helms*, —— U.S. ——, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) (it is settled law that relief need not be judicially decreed in order to qualify a party as "prevailing" and justify a fee award under section 1988); *see also Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). Thus, the above-quoted language, "the party legally responsible for relief on the merits," refers specifically to the "losing party" in *Graham*—the only party from whom the plaintiffs could properly seek section 1988 fees given Kentucky's constitutional immunity from liability for such awards. The language relied upon by the intervenors is therefore specific to the facts of *Graham* and is not fairly interpreted as a definitive statement on section 1988 liability in factually distinguishable cases.

We find similarly unpersuasive the intervenors' reliance on the language from *Graham* referred to in the text accompanying this footnote. A party found not to have been defeated by plaintiffs, either because of the type of legal immunity at work in *Graham* or because liability on the merits could not be established, is, by the express language of section 1988, not a party properly liable for a prevailing party's attorneys' fees. As we have emphasized, the intervenors were shielded by no immunity from fee liability and they were thoroughly unsuccessful in staving off the plaintiffs' challenge to the abortion statute.

[14] For example, the intervenors assert that in *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), the Supreme Court foreclosed intervenor liability for section 1988 fees when the Court observed that the statute's legislative history referred only to cases where "the party to whom fees were awarded

Turning first to the intervenors' assertion that their status in the present action is directly analogous to the status of Kentucky in *Graham*, we concur in the conclusion of the district court that *Graham* does not preclude an award of fees against the interevnors in these circumstances. Significantly, the plaintiffs in *Graham* sought and were initially awarded fees from an entity, the State of Kentucky, which was immunized by the Eleventh Amendment from such fee awards and which, subsequent to its dismissal from the lawsuit, was a non-party to the substantive litigation. The intervenors, on the other hand, were not only actively participating parties in the plaintiffs' challenge of the abortion statute, but were parties whose presence in the lawsuit was both voluntary and self-initiated. The decision by the intervenors to participate as full-fledged parties thus clearly distinguishes, in a critical respect, their situation from that of the State of Kentucky, in that the State refused to waive its Eleventh Amendment immunity by voluntarily joining the lawsuit and consenting to defend state employees sued in their personal capacity. The intervenors may therefore fairly be charged with the consequences of choosing to proceed as intervening defendants rather than as *amici*, a status that would have permitted them to present their legal arguments to the court while protecting them from any liability for fees, *cf. League of Women Voters of California v. F.C.C.*, 798 F.2d 1255,

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had established the liability of the opposing party. . . ." *Id.* at 757, 100 S.Ct. at 1989. *Hanrahan*, however, overturned a decision of this court (i) reversing a directed verdict for defendants in a civil rights suit, (ii) remanding the case for a new trial, and (iii) awarding the plaintiffs section 1988 fees. The Supreme Court held that because our decision only entitled the plaintiffs to a new trial, any determination of whether they had in fact "prevailed", and hence whether an award of section 1988 fees could be awarded, was premature. The facts of the instant case are, of course, different in one crucial respect—the plaintiffs here have unquestionably "prevailed" time and again against the legal arguments and procedural obstacles posed by the intervenors.

1260 (9th Cir. 1986), but which admittedly would have circumscribed their ability to affect the course and substance of the litigation. *See e.g.*, Fed. R. App. P. 29.

Similarly unavailing is the intervenors' attempt to characterize *Graham* as a definitive pronouncement by the Supreme Court on the question of intervenor fee liability under section 1988. In authoring the Court's unanimous decision in *Graham*, Justice Marshall began his opinion as follows:

> The question presented is whether 42 U.S.C. § 1988 allows attorneys' fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails.

473 U.S. at 161, 105 S.Ct. at 3108. We thus decline to read *Graham* as standing for a holding broader than the Court's own stated intention in deciding the case. The intervenors are attempting to stretch *Graham* to answer a question the case simply did not raise. One can comb *Graham* tirelessly without discovering a single explicit or implicit reference to the issue of intervening parties' liability for section 1988 fee awards; *Graham* merely explores the narrow issue of a government entity's liability for section 1988 fees when a prevailing civil rights plaintiff, as the result of the operation of the Eleventh Amendment, has successfully sued state officials but only in their personal capacity. *Glover v. Alabama*, 734 F.2d 691 (11th Cir. 1984), *vacated*, 474 U.S. 806, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985), *aff'd in part, vacated and remanded in part*, 776 F.2d 964 (11th Cir. 1985), a case also relied upon by the intervenors, is distinguishable from the instant case for precisely the same reason.[15]

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[15] Other cases cited by the intervenors for the proposition that fee liability and liability on the merits are inextricably bound are similarly distinguishable from the case at bar. Specifically, we find the intervenors' references to *Supreme Court of Virginia v. Con-*

The plaintiffs, too, refer us to case law which they contend supports their contention that intervening defendants, regardless of the fact that they are not directly responsible for any section 1983 violations, can be assessed section 1988 fees. In *Moten v. Bricklayers, Masons, and Plasterers*, 543 F.2d 224, 239 (D.C. Cir. 1976), for example, the District of Columbia Circuit refused to draw a distinction between defendants and intervening defendants for purposes of fee liability under the fee-shifting provision of Title VII, 42 U.S.C. § 2000e-5(k).[16] In fact, the court eventually allowed an award of attorneys' fees against an entity, a professional association, which had not even sought to intervene in the initial proceedings in the district court but which later attempted to become a party-appellant by filing an appeal which the court of appeals ultimately dismissed for want of jurisdiction. The court in *Moten* explained its fee award against the would-be intervenor by reference to two factors: first, the extent to which the prevailing district court plaintiffs were compelled on appeal to expend additional effort and financial resources in order to defend their previously reached, hard-won settlement agreement; and second, the fact that the would-be intervenor had sought, voluntarily and without invitation, to participate in the case at the appellate stage. *Id.* at 239. It was for these same reasons that the district court in this case awarded section 1988 fees against the intervenors. However, not only were the intervenors in the

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sumers Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), and *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), inapposite. Both cases deal extensively with an issue not remotely suggested by the instant case, common law immunity from the liability, and neither case ever once raises the issue of intervenor liability for statutory attorneys' fees.

[16] In considering awards of attorneys' fees, we may consult related attorneys' fees statutes and case law. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983).

instant case successful in their attempt to intervene at the very outset of this lawsuit, but as fullfledged and fully participating parties, the intervenors have been responsible for far more than causing the plaintiffs to devote a mere six pages of their appellate brief to the intervenors' legal arguments, as was the case in *Moten*. *Id.* Even more significant though, is the fact that unlike the would-be intervenors in *Moten*, the intervenors in this case were thoroughly beaten by the plaintiffs *on the merits* of their legal arguments in numerous proceedings both in the district court and on two separate occasions before this court.

Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979) (per curiam), also buttresses the plaintiffs' claim to fees from intervenors and is very similar to the case at bar. In *Haycraft*, a state court judge intervened in a school desegregation case to present an alternative integration plan that would have prevented the plaintiffs from realizing the full relief that they had sought and ultimately obtained in bringing suit. The Sixth Circuit upheld the district court's award of attorneys' fees against the intervenor-judge under 20 U.S.C. § 1617 (since repealed), the fee-shifting provision of the Emergency School Aid Act of 1972, which provided for discretionary awards of attorneys' fees to prevailing parties in school desegregation cases. Although the intervenor-judge was not a named defendant, had no judgment entered against him personally, and could not himself have been found liable for any relief on the merits, the court of appeals held that the plaintiffs had prevailed against him by defeating his alternate desegretion plan, the submission of which "imposed a substantial barrier to the realization of the full constitutional right of appellees." *Id.* at 132. The circumstances of *Haycraft* are indeed similar to those of the instant case;[17] however, as was true in *Moten*, we

[17] The intervenors would distinguish *Haycraft* from the instant case on two grounds: first, the intervening defendant in that case

believe the pervasive role the intervenors played throughout the course of this lawsuit renders them even more deserving candidates for section 1988 fee liability than the intervening judge in *Haycraft* whose participation in that lawsuit was, by contrast, short-lived and relatively limited in scope.

Finally, there is the virtually identical case of *Akron Center for Reproductive Health v. City of Akron*, 614 F. Supp. 1268 (N.D. Ohio 1984), where, upon remand from the Supreme Court, the district court assessed section 1988 fees against private, intervening defendants [18]

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was, as a state court judge, a "state actor" for purposes of section 1983 liability; and second, the Sixth Circuit concluded that, unlike here, the intervenor-judge had acted in bad faith. While conceding these factual circumstances, we note that the Sixth Circuit's decision in *Haycraft* attached no special significance to the fact that the intervening defendant happened to be a state official. In fact, the court's decision made clear that its award of section 1988 fees could be independently justified by either the fact that the plaintiffs were prevailing parties *or* by the fact that the intervenor-judge was found to have proceeded in bad faith.

[18] Here too, the intervenors urge us to discount the significance of the *Akron* court's award of fees against the intervening defendants. The intervenors rely on two other district court decisions, both from the Sixth Circuit and both pre-dating *Akron*, which refused to assess section 1988 fees against the intervenors despite the Sixth Circuit's prior decision in *Haycraft*. *See Wolfe v. Stumbo*, No. C-80-0285 (W.D. Kentucky December 15, 1983); *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn. December 23, 1981). We decline the invitation to so distinguish *Akron*. *Wolfe* and *Planned Parenthood* attempt to distance themselves from *Haycraft* by pointing to the fact that in *Haycraft* the intervenor was a state official who was found to have intervened in bad faith. As we have already discussed, however, the fact that the plaintiffs in *Haycraft* prevailed against the intervenor, as the plaintiffs in *Akron* did against the intervening defendants there, provided the primary justification for the Sixth Circuit's decision to uphold the fee award. Similarly, as did the Sixth Circuit in *Haycraft*, the district court in *Akron* chose to award fees against the intervenors as the result of the extra effort which the ultimately prevailing parties

who sought unsuccessfully to defend a legal ordinance regulating abortions.[19] The intervening defendants in *Akron* were every bit as vigorous and active in defense of the *Akron* ordinance as the intervenors in this case were in defending the Illinois statute, and, similarly, the plaintiffs in *Akron* prevailed on many of the issues on which the intervening defendants had participated in the lawsuit. The district court's decision in *Akron* rested its award of section 1988 fees to the plaintiffs on two factors: the voluntary nature of the intervening defendants' participation in the action and the extent to which the intervenors ". . . contributed to the effort required of the plaintiffs to substantiate their position in Court." [20] *Id.* at 1273. Significantly the district court in *Akron* relied specifically on *Haycraft* to reject the plaintiffs' assertion that the fact that the intervening defendants were not liable for any violations of the plaintiffs' constitutional rights automatically precluded an imposition of section 1988 fees. While *Akron* is, of course, not controlling authority, the intervenors have failed to posit a single convincing argument for distinguishing that case from the case before us; in both instances, for reasons

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were forced to expend in order to substantiate their legal position. *Akron*, in our view, is thus more faithful to *Haycraft* and hence more persuasive than either the district court cases cited by the intervenors.

[19] The intervenors in *Akron* sought to intervene to protect the very same interests asserted by the intervenors in this case—*i.e.*, the rights of yet unborn fetuses and the rights of parents of minor children of childbearing age.

[20] We refuse to accept the intervenors' argument that the district court's imposition of section 1988 fees, based in part upon the extent to which the intervenors put plaintiffs to greater effort and expense, suggests, in effect, that the plaintiffs should have been entitled to proceed unopposed with their claims. Rather, we believe that in employing such reasoning the district court is simply underscoring the fact that the intervenors, after interjecting their own additional legal theories and arguments into the lawsuit, were defeated by plaintiffs nevertheless.

we have repeatedly stated, the assessment of section 1988 fees against the intervening defendants is entirely consistent with and, more importantly, in furtherance of the intent of Congress in enacting the statute.[21]

Having located nothing in either the express language of section 1988 or in its legislative history nor pertinent case law conclusively linking a party's liability for substantive relief with liability for fees (*see* n.11 and n.13, *supra*), we agree with the district court that the fact that the intervenors were found to have themselves actually violated none of the plaintiffs' constitutional rights does not *require* that they be immune from fee liability pursuant to section 1988. Accordingly, the district court's award of attorneys' fees to the plaintiffs for work performed in vigorously defending their civil rights before this court and the district court is upheld in its entirety.

B. *The Intervenors' Liability for Section 1988 Fees in the Supreme Court.*

In addition to contesting their liability for section 1988 fees incurred before the district court and the court of appeals, intervenors Diamond and Williams also separately challenge their liability for fees in connection with the Supreme Court phase of this litigation.[22] The inter-

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[21] The plaintiffs cite two other district court cases, *Decker v. United States Dept. of Labor*, 564 F.Supp. 1273 (E.D.Wis. 1983) and *Vulcan Society of Westchester County, Inc. v. Fire Department of the City of White Plains*, 533 F.Supp. 1054 (S.D.N.Y. 1982), in suport of the intervenors' fee liability. While instructive and consistent with the reasoning of plaintiffs' other cases, we find these two lawsuits less persuasive because in each the intervening defendants ordered to pay section 1988 fees were arguably more culpable parties than are the intervenors in the instant case.

[22] The intervenors also challenge the propriety of holding the estate of Dr. Jasper Williams jointly liable for the plaintiffs' Supreme Court fees since Williams died in a plane crash prior to the Supreme Court's grant of review in this case. While Williams' death did precede the Court's decision to hear the appeal, both the notice

venors' central argument on this score is the same one we have just rejected with respect to fee liability in the lower federal courts—*i.e.*, that private intervenor status insulates a party entirely from liability for attorneys' fees under section 1988. We thus turn to the intervenors' second argument, that section 1988 explicitly permits fee awards only "as part of the costs," and because the Supreme Court failed to award the plaintiffs any costs no award of fees should have been allowed by the district court.

We must again commence our analysis with a review of the pertinent statutory language. For these purposes, the relevant language of section 1988 permits a district court to award the prevailing party "a reasonable attorney's fee . . . *as part of the costs.*" (Emphasis added). The intervenors assert that because the Supreme Court's disposition of their appeal did not include an award of costs to the plaintiffs, the statutory prerequisite for an award of fees is absent. The plaintiffs, on the other hand, reassert the position that their status as a prevail-

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of appeal and the jurisdictional statement filed with the Court bore the name of Dr. Williams and asserted his interests as giving rise, in part, to the controversy before the Court. Supreme Court Rule 40 deals with the substitution of deceased parties and permits the deceased's proper representative or the opposing party to move to have another party substituted for the deceased. As the Supreme Court noted in its decision dismissing the appeal for want of jurisdiction, no such formal substitution was made here, *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 1701 n. 4, 90 L.Ed.2d 48 (1986). Intervenors' counsel, Americans United for Life Legal Defense Fund, did attempt to substitute itself for Dr. Williams but was found to be an improper party for such a purpose. We thus concur in the district court's decision to hold the estate of Dr. Williams jointly liable for the fees incurred in the Supreme Court by the plaintiffs. A procedural avenue was afforded Williams' estate to escape liability from an adverse decision by the Supreme Court; so far as we are able to discern, the estate has furnished no explanation as to why it failed to perfect Williams' substitution. Under these circumstances we see no reason why Williams' estate should not be held liable.

ing party, and not the existence of an award of costs, is dispositive of their entitlement to fees under section 1988. While it is true that the Supreme Court did not award costs to the plaintiffs, the Supreme Court Rule governing costs makes no provision for costs in cases such as this where the Court, after briefing and argument, dismisses an appeal for want of jurisdiction.[23] It appears that a claim of this nature has not been previously raised before the Court; consequently, we are faced with the novel question: Is an award of attorneys' fees pursuant to section 1988 precluded in these circumstances by the absence of an award of costs by the Supreme Court? We are persuaded that the answer to this question is "no".

Notwithstanding the intervenors' persistent assertions to the contrary, our reading of the case law proffered by the parties, in addition to our own research, simply does not support the proposition that an award of section 1988 fees by a district court for work done before the Supreme Court can be ordered *only* when the Supreme Court has itself first seen fit to order the losing side to pay costs. In *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), upon which the intervenors rely initially in support of their argument, the Supreme Court merely held that attorneys' fees could properly be categorized as "costs," and as such, were not subject to Eleventh Amendment immunity, which would ordinarily bar monetary damage awards obtained in federal courts

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[23] Supreme Court Rule 50 governs awards of costs in the Supreme Court but provides for costs to be awarded only when the Court expressly affirms, reverses or vacates a judgment of a lower court. Entitled "Costs," Rule 50 states in relevant part:

> .1. In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.
>
> .2. In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court.

against states sued as defendants in civil rights actions. Acknowledgment by the Court that Congress had the authority to characterize fee awards as an item of costs, however, is significantly different from a pronouncement that a separate award of costs is an absolute prerequisite to an award of attorneys' fees under section 1988; *Hutto* nowhere purports to make such a pronouncement.

Similarly, the intervenors' primary reliance in this regard upon *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), is misplaced. *Marek*, too, was a civil rights suit brought pursuant to section 1983 and involved police officers who, in responding to a domestic disturbance call, shot and killed the plaintiff's adult son. Prior to trial, the defendants made a settlement offer of $100,000, which included costs and attorneys' fees, but which the decedent's parents declined. As a consequence, the case proceeded to trial and the jury ultimately returned a verdict favorable to the plaintiff, awarding $5,000 on a state tort-law claim, $52,000 for the section 1983 violation, and $3,000 as punitive damages. The plaintiff subsequently filed a motion for attorneys' fees under section 1988 seeking to be reimbursed for fees paid to counsel, including fees for work performed *subsequent* to the defendants' rejected settlement offer. Pursuant to Federal Rule of Civil Procedure 68,[24] the district court denied the plaintiff's motion for fees, ruling that the term "costs," as employed in the Rule, included attorneys' fees and thus precluded the plaintiff from recovering fees incurred after the settlement offer was spurned. *Chesny v. Marek*, 547 F.Supp. 542 (N.D.Ill.1982). We reversed the district court, reasoning that its decision would place civil rights plaintiffs and counsel in a "predicament" that "cuts against the grain of § 1988."

[24] Federal Rule of Civil Procedure 68 provides that if a timely pretrial offer of settlement is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer he refused to accept, he must pay the "*costs*" incurred after the making of the offer.

Chesny v. Marek, 720 F.2d 474, 478-79. The plaintiffs' attorneys, we explained, would be forced to think very carefully before rejecting even an inadequate offer, and might be deterred from bringing good faith actions because of the prospect of losing the right to attorneys' fees if a settlement offer more favorable than the ultimate recovery were rejected. *Id.* Consquently, we concluded that the legislators who had enacted section 1988 would not have wanted its effectiveness "blunted" due to the interpretation of the interplay of section 1988 and Rule 68 adopted by the district court. *Id.*

The Supreme Court, however, ultimately sustained the district court's synthesis of Rule 68 and section 1988, finding it more consistent with the pro-settlement policy of Rule 68. The Court narrowly framed the relevant question at issue in *Marek* as: "[W]hether the term 'costs' in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988." 473 U.S. at 7, 105 S.Ct. at 3016. Despite the absence of a precise definition of the term "costs" in Rule 68 itself, the Court held:

> In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.
>
> Here, respondents sued under 42 U.S.C. § 1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's

> fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.

473 U.S. at 9, 105 S.Ct. at 3017. (Citations omitted).

Properly understood, *Marek* stands for the proposition that in the absence of any internal definition of "costs" in Rule 68, the term "costs" should be construed to include attorneys' fees authorized under section 1988.[25] The Court reasoned that if fees were excluded from the costs limitations imposed by Rule 68, attorneys representing civil rights plaintiffs would have little or no incentive to consider a Rule 68 settlement offer because, regardless of the eventual outcome of the case at trial,

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[25] Both the district court in awarding Supreme Court fees and the plaintiffs in their briefs stress the fact that unlike Federal Rule of Civil Procedure 68, Supreme Court Rule 50 does contain an internal definition of "costs" and that such an internal definition is "critical." (Mem. Op., December 5, 1986 at p. 4 n. 8). According to the plaintiffs, the fact that Supreme Court Rule 50 expressly limits its definition of "costs" to include such traditional items as printing of briefs and service of process renders it inappropriate to engraft attorneys' fees onto that definition. In support of their argument, the plaintiffs point to a footnote in *Marek* which states in effect that when examining a statute that is alleged to be a substantive source of attorneys' fees, it is incumbent upon the court to rely upon the definitions, if any, set forth in that statute. 473 U.S. at 9-10 n. 2, 105 S.Ct. at 3017-18 n. 2; *see also Kelley v. Metropolitan County Board of Education*, 773 F.2d 677, 681 n. 5 (6th Cir. 1985) (en banc). The flaw in the plaintiffs' argument, and in the district court's partial reliance thereon, lies in the fact that it is section 1988, *not* Supreme Court Rule 50, that is the substantive source of attorneys' fees at issue here and there is no disputing that the language of section 1988 ties attorneys' fees directly to an award of costs.

their fees for post-offer legal work would be recoverable. *Id.* at 10, 105 S.Ct. at 3017-18. The instant case, however, is clearly distinguishable from *Marek* inasmuch as a purported settlement of the case is not at issue and thus the operation of Rule 68 was never triggered. Unconstrained as we are in this case by any countervailing policy considerations counselling settlement, we see no reason to prevent a prevailing party in the Supreme Court from recovering section 1988 fees simply because the Supreme Court Rules neither affirmatively provide for nor prohibit an award of costs when a party succeeds in having an appeal dismissed on jurisdictional grounds.[26] That the Supreme Court Rules fail specifically to authorize an award of costs to those parties whose successful advocacy before the Court is not characterized by circumstances falling neatly within the interstices of everyday procedure is an insufficient justification for interpreting section 1988 in such a way as to force prevailing civil rights plaintiffs to themselves absorb the costs of defending lawsuits the appealing party lacked proper standing to bring. Such a result would stand as a formidable impediment to the full achievement of the important objectives section 1988 was conceived and enacted to further.

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[26] The intervenors do not even concede that the plaintiffs were "prevailing parties" before the Supreme Court. According to the intervenors, "[t]he Court did not reach or resolve the underlying constitutional issues, and plaintiffs did not secure a determination from the Court that the challenged provisions were unconstitutional. By persuading the Court that intervenors lacked standing, plaintiffs did not gain any additional relief or benefit, but merely preserved the status quo." Reply Brief at 12. We fail to comprehend how the intervenors can seriously maintain that the plaintiffs did not prevail against them in the Supreme Court. Not only do the intervenors admit that the plaintiffs succeeded in persuading the Court that the intervenors lacked any legally cognizable interests entitling them to bring their appeal, but in preserving the "status quo" the plaintiffs succeeded in preserving their substantial victories over the numerous sections of the abortion law struck down in this court and the district court.

Accordingly, while we reserve judgment for the moment on the actual amount of Supreme Court fees the plaintiffs are entitled to, the district court's authority to render such an award, even in the absence of any award of costs by the Supreme Court, is sustained.[27]

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[27] The plaintiffs have referred us to and succeeded in persuading the district court that the case of *Local 17, International Association of Heat and Frost Insulators and Asbestos Workers v. Young*, 775 F.2d 870 (7th Cir. 1985), is analogous to the instant case. In *Local 17*, we upheld a district court's award of costs and fees to a party who had successfully opposed a petition to the Supreme Court for a writ of certiorari in a labor case. As is true in this case, the Supreme Court Rules make no provision for an award of costs to parties who successfully resist a petition for a writ of certiorari.

Our decision in *Local 17* was based largely on *Perkins v. Standard Oil Company of California*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1970), which we characterized in our opinion, erroneously it now seems (*see infra*), as a case where the Supreme Court permitted the district court to award fees to a petitioner proceeding under the fees provision of the Clayton Act who sought reimbursement for fees incurred in successfully opposing a petition for certiorari. Although the district court and the court of appeals in *Perkins* both denied petitioner fees for work done before the Supreme Court had not itself mentioned fees in either its decision in the case or in its mandate, the Supreme Court reversed and held that its own failure to consider the appropriateness of fees simply left the matter to the discretion of the district court. The plaintiffs assert that our willingness to permit an award of fees in *Local 17* should control our decision in the instant case. A thorough reading of both *Perkins* and *Local 17*, however, convinces us that, despite some superficial similarities, neither case is sufficiently analogous to dictate our decision here.

Local 17 involved the narrow issue of whether a district court had authority to award attorneys' fees under section 102 of the Labor-Management Reporting and Disclosure Act for work performed resisting a petition for certiorari in the Supreme Court. In sharp contrast to section 1988, which provides that attorneys' fees may be awarded "as part of the costs," section 102 of the LMRDA broadly authorizes courts to grant those whose rights under the Act have been infringed "such relief . . . as may be appropriate," 29 U.S.C. § 412. Thus, despite the fact that the plaintiff in *Local 17* received attorneys' fees for services not explicitly made

C. *The First Amendment as a Bar Against an Award of Section 1988 Fees to the Intervenors*

Having decided that section 1988 authorizes district courts to award attorneys' fees against private intervening defendants and that the district court's award of Supreme Court fees to the plaintiff was similarly proper, we turn to the intervenors' constitutional challenge to their liability for fees.[28] The intervenors argue that the district court's award of more than $200,000 in attorneys' fees against them represents a retaliatory sanction that impermissibly infringes upon their ability to engage in advocacy through litigation, a form of political expression protected by the First Amendment.[29] In

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compensable by the Supreme Court Rules, the statutory source of that award, section 102 of the LMRDA, contains significantly broader language susceptible to greater influence by equitable factors than the language employed in section 1988. Reliance by the plaintiffs on *Perkins* is similarly misplaced. That case, our own restatement of its facts in *Local 17* notwithstanding, did not involve the Supreme Court's affirmance of an award of attorneys' fees to a party who successfully resisted a writ of certiorari. Instead, the petitioner in *Perkins* was awarded fees for succeeding in obtaining reinstatement of a verdict that had been overturned in part by the court of appeals. *Perkins v. Standard Oil*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969). As a successful party before the Supreme Court, *Perkins* was thus entitled to costs pursuant to Supreme Court Rule 50, and, consequently, the issue of whether or not fees could be awarded in the absence of a party's eligibility for an award of costs was never addressed.

[28] We agree both with the plaintiffs and the district court that, with respect to fees incurred before this court and the district court, the intervenors did not raise this argument with sufficient specificity before the district court and thus waived it for purposes of appellate review. However, the intervenors' First Amendment claim was timely and cogently presented to the district court with respect to the intervenors' liability for section 1988 fees incurred by the plaintiffs in the Supreme Court. As our analysis of this claim is identical in the case of both district court fee awards, we do not differentiate between the contested awards in the text of the opinion.

[29] For a full exposition of this argument, *see e.g.*, Goldberger, *First Amendment Constraints on the Award of Attorney's Fees*

NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), the Supreme Court held that state rules promulgated to regulate the legal profession and the solicitation of legal business unconstitutionally abridged the NAACP's right to associate for the purpose of advancing and expressing beliefs and ideas. *Id.* at 428-30, 83 S.Ct. at 335-36. Subsequent Supreme Court decisions have interpreted *Button* as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In Re Primus*, 436 U.S. 412, 426, 98 S.Ct. 1893, 1901, 56 L.Ed.2d 417 (1978). It is upon these authorities that the intervenors assert that the district court's award of section 1988 fees against them is a punitive measure which operates as "a blatant restriction on [the] fundamental freedoms of association and expression." We find this argument far-fetched indeed.

Unlike *Button* and *Primus*, this lawsuit does not involve rules and regulations governing attorney conduct which place specific and admittedly severe restrictions on the ability of counsel to locate and recruit potential litigants.[30] Instead, at issue here is a statute which au-

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Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer, 47 Ohio St.L.J. 603 (1986).

[30] The district court rejected the intervenors' First Amendment argument on the basis of the Supreme Court's ultimate finding in *Diamond v. Charles* that the intervenors lacked any judicially cognizable interest in defense of the abortion statute, 106 S.Ct. at 1700, and on the grounds that participation in the lawsuit as *amici curiae* would have satisfied their First Amendment right of access to the courts. Because our decision today finds nothing inconsistent between the right of access to the courts recognized in *Button* and *Primus* and section 1988, we need not discuss the district court's *ratio decidendi* on this issue as its decision seems to permit the conclusion that section 1988, in some circumstances, may indeed unconstitutionally chill the rights of civil rights defendants and intervening defendants.

thorizes the payment of a successful civil rights litigant's attorneys' fees by the unsuccessful opposing party. Section 1988 does not interfere with an attorney's ability to associate with prospective clients and to advise them on the best course to take in seeking to vindicate their potentially significant constitutional claims; section 1988 simply provides an incentive for civil rights plaintiffs to bring lawsuits on their own and to insure thereby the continued enforcement of the civil rights laws. It is thus not accurate to characterize the reimbursement of prevailing civil rights plaintiffs for their attorneys' fees as a "sanction" or "penalty" on those who oppose such suits. While *Button* and *Primus* undeniably stand for the proposition that a right of access to the courts is guaranteed to those who seek to engage in litigation as a form of political expression, neither case suggests that such use of the judicial forum is entitled to be conducted free from both the inherent and statutorily imposed financial consequences of such activity.

Litigation is not purely speech, it is more; litigation is conduct which can and does impose considerable costs on the parties as well as upon the federal judiciary. Where, as here, Congress has determined that a particular class of litigants, civil rights plaintiffs, is deserving of a fee-shifting scheme to make them whole after incurring substantial expenses in vindicating their constitutional rights, we refuse to hold such a scheme violative of the First Amendment simply because it forces those who choose voluntarily to interject themselves into such lawsuits to think twice before engaging in battle.

D. *The Reasonableness of the District Court's Award of Supreme Court Fees and Costs*

Appellate review of an award of attorneys' fees pursuant to section 1988 is very limited in scope, for the determination of such awards is generally left to the sound discretion of the district court. *Hensley v. Ecker-*

hart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); *Lightfoot v. Walker*, 826 F.2d 516, 520 (7th Cir.1987). Although due deference is owed a district court's assessment of fees and costs, the single most important criterion in evaluating the appropriateness of such awards is their "reasonableness." *See* 42 U.S.C. § 1988 (district court may allow prevailing party a "reasonable attorney's fee"); *see also Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939 (hours "reasonably expended" are compensable); *Gekas v. Attorney Registration and Disciplinary Commission*, 793 F.2d 846, 853 (7th Cir. 1986). Accordingly, where the district court has ordered reimbursement for fees and costs that are objectively judged to have been unnecessary for the competent preparation of a case for trial or appeal, an abuse of discretion may be found. *Cf. Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir.1984); *see also Bonner v. Coughlin*, 657 F.2d 931, 934-35 (7th Cir.1981).

The intervenors do not dispute that plaintiffs' counsel expended an aggregate of 926 hours in preparing for argument of their case before the Supreme Court. Rather, the intervenors complain that the number of attorney hours for which reimbursement is sought is, in certain respects, unreasonable and excessive. To the extent expressed below, we agree.

While we do not take issue with the district court's considerably more informed conclusion that appeal of this case to the Supreme Court required of the plaintiffs a "tremendous amount of additional work" (Mem.Op., December 5, 1986 at 10), we simply cannot justify as "reasonable" all of the time and effort which plaintiffs' counsel apparently expended in preparing for argument before the Court. In the nearly five years during which this case traveled back and forth between this court and the district court (proceedings characterized by a voluminous record including literally hundreds of motions, legal memoranda and other submissions), the plaintiffs

incurred fees of slightly more than $200,000. In contrast, in just the fourteen or so months during which counsel for the plaintiffs were engaged in pre-argument preparation as well as preparation of supplemental, post-argument materials in the Supreme Court, plaintiffs' counsel logged 926 hours of billable time at a cost of roughly $111,750.00. While appreciative of the fact that prior to its dismissal on jurisdictional grounds this case figured to impact substantially on the national controversy surrounding abortion,[31] we are unable to escape the conclusion that the extent of the plaintiffs' pre-argument preparation, and consequently the number of hours expended thereon, was, in several respects, excessive. In this connection, we find the First Circuit's opinion in *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir.1984), to be persuasive.

Grendel's Den addressed the reasonableness of a largely unsubstantiated section 1988 fee petition submitted by counsel in a First Amendment case that had been litigated all the way to the Supreme Court. Recognizing the difficulty in calculating a reasonable attorneys' fee award where the petitioner had failed to submit reliable documentation, the First Circuit lowered the award of fees made by the district court and also found that even assuming petitioner's counsel had in fact expended all of the hours claimed, such an expenditure of time and effort constituted unreasonable preparation. The standard of service to be rendered and compensated in cases such as this is not one of perfection, the First Circuit explained; rather, "a litigant is entitled to attorney's fees under 42 U.S.C. § 1988 for an effective and completely competi-

[31] Arguments before the Supreme Court in this case and in the case of *Thornburg v. ACOG*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), were heard on the same day and it was in the *amicus* brief filed by the government in these cases that the Solicitor General recommended that the Court reconsider its holding in the landmark decision of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

tive representation but not one of supererogation." *Id.* at 953-54. No doubt the line between ample preparation and excessive preparation is, at the margin, a fine one; the facts of this case, however, do not in our opinion present the close case.

We have carefully reviewed the contemporaneous time records submitted by plaintiffs' counsel and although these exhibits make a precise accounting of time impossible, there are two specific areas in which the preparation resorted to by counsel was, in our view, in excess of what is reasonable under the circumstances. The first area of concern involves the amount of time devoted by plaintiffs' counsel to reviewing and re-reviewing, revising and re-revising their briefs and other submissions. While our calculations indicate that fewer hours were spent on these tasks than the calculations proffered by the intervenors (180 hours versus 265 hours),[32] the fact remains that the inevitable product of assigning six separate experts to edit and fine-tune each of the plaintiffs' briefs is, to some degree, an excessive and unnecessary duplication of time and effort. We do not mean in any way to underestimate the importance of careful proofreading and thoughtful editing, but there comes a time at which such endeavors reach a point of diminishing returns, and it is at that point where shifting the cost of such activity is inappropriate. The point was reached and exceeded here. We believe 150 hours (equivalent to 15 ten-hour days) should have afforded more than ample time for plaintiffs' counsel to perform editorial tasks and add the "finishing touches" to their briefs and supplemental submissions. Consequently, we disallow 30 hours of pre-argument

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[32] Although it is literally impossible to determine from the time sheets and the affidavits submitted by plaintiffs' counsel exactly how much time they spent proofreading, editing and revising, our best calculation (no such calculation appears in the district court's decision) is that approximately 180 hours were expended by counsel on such tasks.

preparation at an average cost of $122.50 per hour[33] or a total of $3,675.

Our second area of concern involves the holding of mock oral arguments (so-called "moot" arguments) by plaintiffs' counsel in New York and Seattle as well as in Chicago. The plaintiffs make no attempt to explain why conference calls, a method of communication used frequently and effectively in connection with other facets of their case preparation, would not have allowed for equally productive "moot" arguments of the case. While parties are undeniably entitled to solicit and to engage the services of legal experts the world over, section 1988's attorneys' fee provision does not require that even the excessive costs incurred in securing such consultations be charged to the ultimately nonprevailing party. The holding of in-person "moots" on both the east and west coasts, in addition to the one held in Chicago, resulted not only in excessive expenditures but is precisely the sort of "supererogation" warned against and rejected by the First Circuit in *Grendel's Den*. If the "reasonable attorney's fee" limitation imposed by section 1988 is to mean anything, lines, admittedly difficult and subjective ones, must be drawn somewhere; we do not think it overly harsh to draw such a line here. We therefore reduce the district court's award by an additional $1,876.75, the claimed cost of airfare and related expenses in Seattle and New York for Ms. Connell and Mr. Carey.

Aware as we are of the sound rationale for customarily deferring to the fee awards of district courts, such routine deference seems less justified when fees incurred in connection with appellate work, an aspect of legal practice with which *we* are intimately familiar, are in dispute. Furthermore, putting to one side the issue

[33] The rate of $122.50 per hour represents the reasonable average hourly rate, as found by the district court, of the six attorneys retained by the plaintiffs.

of the proper degree of deference due district court fee determinations, it makes no sense in a case such as this, which has already consumed in excess of seven years, to remand the case to the district court for further parsing of dollars resulting in the expenditure of even more time and money. *See e.g., Grendel's Den*, 749 F.2d at 951; *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (en banc). As the Supreme Court noted sensibly in *Hensley*, "[a] request for attorney's fees should not result in a second major litigation." 461 U.S. at 437, 103 S.Ct. at 1941. Accordingly, in light of our finding that certain hours and costs claimed by the plaintiffs are in excess of what is reasonable,[34] this court reduces the district court's award of Supreme Court fees to the plaintiffs by $5,881.75, yielding a final award of $105,896.76. We believe this to be a reasonable fee, and it is only a reasonable fee to which section 1988 entitles prevailing plaintiffs.

III. CONCLUSION

In summary, we hold that in the unusual circumstances presented by this case, an award of attorneys' fees against private intervening defendants is permitted pursuant to section 1988 and, similarly, that the failure of the Supreme Court to make an explicit award of costs to the plaintiffs in connection with the argument of their case before the Court does not bar an award of Supreme Court fees against the intervenors. Furthermore, we find totally unpersuasive the intervenors' argument that section 1988 runs afoul of the First Amendment by requiring defendants in civil rights suits to reimburse pre-

[34] We note also the unreasonableness of the plaintiffs' attempting to shift the cost of three nights' lodging in Washington for Mr. Carey, at $165 per night, in connection with the argument of this case before the Supreme Court. *See Grendel's Den*, 749 F.2d at 957 (cost of only one night's stay in Washington for argument before Supreme Court properly assessed against defendants). The district court's award is thus further reduced by the cost of these additional two nights' lodgings, $330.

vailing plaintiffs for legal fees reasonably expended in the course of litigation. Finally, we modify the fee award made to the plaintiffs by the district court, reducing the award by $5,881.75 to reflect our belief that certain of the hours and expenses claimed by plaintiffs' counsel were, as discussed, unreasonable and excessive.

For the foregoing reasons, the decision of the district court is

AFFIRMED AS MODIFIED.

MANION, Circuit Judge, dissenting.

I respectfully dissent. A court may award attorneys' fees under 42 U.S.C. § 1988 only to "prevailing parties." The majority holds that the plaintiffs "prevailed" against the intervening defendants "notwithstanding the fact that the intervenors were not and could not themselves have been found guilty of violations of the plaintiffs' constitutional rights. . . ." In so holding, the majority thoroughly discusses, but does not find controlling, cases holding that § 1988 fee awards against a defendant are inappropriate absent the defendant's liability on the underlying civil rights claims. I disagree.

In *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the Court held that § 1988's fee-shifting provisions must be applied against the "pre-existing background of substantive liability rules." *Id.* at 171, 105 S.Ct. at 3108. "Section 1988 simply does not create fee liability where merits liability is nonexistent." *Id.* at 168, 105 S.Ct. at 3107. The fact that a plaintiff may prevail on the merits against one party does not entitle him to receive attorneys' fees as a "prevailing party" from other parties who were not liable to plaintiff on the merits. *Id.*; *see also Annunziato v. The Gan, Inc.*, 744 F.2d 244, 249-53 (2d Cir. 1984).

The majority's holding is also inconsistent with *Hewitt v. Helms*, —— U.S. ——, 107 S.Ct. 2672, 96 L.Ed.2d

654 (1987). In *Helms*, the Court held that "moral victories" do not entitle a person to fees as a prevailing party. To "prevail", a party must receive some relief, either through a judgment or otherwise, "*which affects the behavior of the defendant towards the plaintiff.*" 107 S.Ct. at 2676 (emphasis in original). Here, the only "relief" plaintiffs received with respect to the intervenors was the knowledge that the federal courts disagreed with the intervenors' views concerning the constitutionality of the Illinois abortion statute. This is insufficient to allow them to collect fees as "prevailing parties." In fact, plaintiffs here present a much less compelling case than that presented in *Hewitt v. Helms*. In *Helms*, the plaintiff established that the defendants violated his constitutional rights. Despite this, the Supreme Court completely denied the plaintiff attorneys' fees; the defendants had avoided liability because they were immune from damages and because the plaintiff's injunction request was rendered moot by the plaintiff's release from prison. If the plaintiff in *Helms* was denied attorneys' fees despite his establishing as a "private attorney general" that the defendants violated his constitutional rights, it is difficult to see how plaintiffs in the present case can obtain fees against intervenors who did not violate any of plaintiffs' rights and were not liable on the merits.

In upholding the district court's award of fees, the majority relies primarily upon the fact that intervenors voluntarily entered the litigation and that their presence increased the cost of litigation to plaintiffs. These facts, however, do not make the intervenors liable to plaintiffs on plaintiffs' 42 U.S.C. § 1983 claims. *See Annunziato*, 744 F.2d at 253-54 ("Since a party's liability under § 1983 depends upon its alleged unconstitutional activities *giving rise* to the litigation, [the non-state actor defendant's] *post facto* defense of this lawsuit . . . cannot form a proper basis for . . . fee liability under § 1988.") (emphasis in original). Moreover, neither of

these facts takes this case from under the rule applied in both *Graham* and *Helms:* the award of attorneys' fees against a particular defendant under § 1988 is governed by whether the plaintiff prevails against that particular defendant on the underlying § 1983 claim. Section 1988 simply does not create an independent federal cause of action for attorneys' fees.

Finally, plaintiffs are not without protection from intervenors. Many potential intervenors will not be able to establish standing absent their own liability on the merits. Admittedly, many intervenors may be able to establish standing even though they may not be subject to liability under § 1983 (e.g., employees who may intervene to challenge or to uphold the adoption of an affirmative action plan) or, as in the present case, intervenors may be mistakenly permitted to litigate despite their lack of standing. However, neither of these groups of intervenors are engaging in activities that violate the civil rights laws. Furthermore, should such intervenors litigate in bad faith, vexatiously, or unreasonably, other litigants are adequately protected without having to resort to § 1988. See, e.g., Fed. R. Civ. P. 11; 28 U.S.C. § 1927.

In short, to "prevail" against a particular defendant under § 1988, a party must "prevail" on the underlying civil rights claim against that particular defendant. Plaintiffs could not and did not prevail against the intervening defendants on their underlying civil rights claim. As such, it was inappropriate for the district court to assess attorneys' fees against the intervening defendants under § 1988. I would reverse the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4541

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs,

v.

BERNARD CAREY, *et al.*,
Defendants.

No. 79 C 4548

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Plaintiffs,

v.

TYRONE C. FAHNER, *et al.*,
Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on plaintiffs'[1] supplemental petitions for attorneys' fees and costs pur-

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[1] This lawsuit involved two consolidated cases, *Charles v. Carey*, 79 C 4541, and *The Hope Clinic for Women, Ltd. v. Fannel*, 79 C 4548. The American Civil Liberties Union orchestrated the petition filed in 79 C 4541 on behalf of attorneys Carey, Connell, Rand, Benshoof and Hunter. Mr. Susman filed his own petition in 79 C 4548.

suant to 42 U.S.C. § 1988 seeking compensation for their work during the Supreme Court phase of this litigation. For the following reasons, fees and costs in the amount of $111,778.51 shall be awarded.[2]

The award of attorneys' fees in this case represents the final question in a suit that has continued for seven years. As the history of these proceedings is set forth fully in prior opinions,[3] the court need only examine the facts directly relevant to the fee petitions presently before the Court. On November 30, 1984, the Seventh Circuit affirmed this Court's entry of a permanent injunction as to §§ 6(4), 2(10), and 11(d) of the Illinois Abortion Law,[4] and also permanently enjoined the enforcement of § 6(1). *Charles v. Carey*, 749 F.2d 452 (7th Cir. 1984). Defendant-intervenors Dr. Eugene F. Diamond, and Dr. Jasper F. Williams[5] appealed to the United States Su-

[2] This award is broken down as follows:

NAME	HOURS ALLOWED	HOURLY RATE	LODESTAR AWARD
Connell	461.90	$100	$ 46,190.00
Carey	282.40	140	$ 39,536.00
Rand	55.30	80	$ 4,424.00
Hunter	51.70	125	$ 6,462.50
Susman	37.90	150	$ 5,685.00
Benshoof	37.10	140	$ 5,194.00
			$107,491.50
Costs			
79 C 4541			$ 3,704.51
79 C 4548			582.50
			$ 4,287.01
		Total	$111,778.51

[3] For the most complete discussion of the history, *See Diamond v. Charles*, 106 S.Ct. 1697 (1986).

[4] 1975 Ill. Laws, Pub. Act 79-1106, as amended, now codified as Ill. Rev. Stat. ch. 38, ¶¶ 81-21 to 81-34 (1983).

[5] Dr. Williams died on April 15, 1985, after the filing of the notice of appeal to the Supreme Court. No one was substituted for

preme Court from this decision. The State defendants did not join in this appeal. The Court noted probable jurisdiction. *Diamond v. Charles*, 105 S.Ct. 2356 (1985). After hearing oral argument, the Supreme Court held that the intervenors did not have standing to bring this appeal, and thus, the case was "dismissed for want of jurisdiction." 106 S.Ct. 1697 (1986). The petitions presently before the Court seek only fees and costs generated in defending against the intervenors' unsuccessful appeal, to the Supreme Court.

DISCUSSION

The intervenors oppose plaintiffs' fee petitions on several grounds. The Court is not persuaded by any of the intervenors' arguments in opposition to fees. First, notwithstanding this Court's earlier decision to the contrary, the intervenors continue to claim that fees may not be assessed against them because they are not liable for relief on the merits. Defendants rely upon the decision in *Kentucky v. Graham*, 105 S.Ct. 3099 (1985), for their assertion. In its March 6, 1986, opinion, however, this Court clearly rejected this argument, holding that *Graham* does not relieve the intervenors of liability for attorneys' fees.[6]

Second, the intervenors contend that fees may not be awarded because the Supreme Court assessed no costs against them. In support of this assertion, defendants argue that section 1988 specifically states that fees are to be awarded "as part of costs," and that under Supreme Court Rule 50, costs in the Supreme Court are only available when the Court affirms, reverses, or va-

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him, however, all Supreme Court briefs filed by the intervenors bore his name and asserted his interests. Thus, fees are appropriately assessed against Dr. Williams' estate.

[6] The intervenors filed an appeal on April 4, 1986. This appeal is presently pending before the Seventh Circuit.

cates the judgment of the lower court.[7] Despite its superficial appeal, this argument is not supported by the relevant case law.

In *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 667 (6th Cir. 1985) (*en banc*), *cert. denied*, 106 S.Ct. 853 (1986), the court ruled that an award of costs pursuant to Fed. R. App. P. 39, the courts of appeals' analogue to Supreme Court Rule 50, is not an absolute prerequisite to an award of attorney's fees under section 1988 for services rendered on appeal. 773 F.2d at 681. The court rejected the argument that the Supreme Court's decision in *Marek v. Chesney*, 105 S.Ct. 3012 (1985),[8] required a district court to deny a request for

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[7] Supreme Court Rule 50; subsections .1 and .2 provide:

> .1. In a case of affirmance if any judgment or decree by this court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.
>
> .2. In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed by to appellant or petitioner, unless otherwise ordered by the Court.

[8] The intervenors argue that the decision in *Marek v. Chesney* precludes an award of attorneys' fees here. *Marek* presented the issue of whether section 1988 obligates a defendant to pay attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Fed. R. Civ. P. 68 when the plaintiff ultimately recovers a judgment less than the pretrial offer. Rule 68 provides that if a timely offer of judgment is not accepted and "the judgment finally obtained by the offeree is not more favorable that the [pretrial] offer, the offeree must pay the *costs incurred after the making of the offer*." Fed. R. Civ. P. 68 (emphasis added). The Supreme Court thus was faced with defining "costs," as Rule 68 contains no internal definition of that term. For the purposes of Rule 68, the Supreme Court construed "costs" to include attorney's fees. 105 S.Ct. at 3017.

The intervenors' attempt to extend *Marek* to preclude an award of fees in the instant case is unwarranted. First the Supreme Court in *Marek* carefully limited its holding to a construction of Rule 68. *Id.* at 3016-18. Second, the Court declined to construe "costs" to include attorney's fees whenever the term "costs" is used in other

attorney's fees if costs had not been awarded at the appellate level. *Id.* at 682, n.5. *See also Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275, 1285-86 (N.D. Ohio 1985) (limited award of costs to prevailing party by the Supreme Court in abortion rights case does not preclude full award of fees under 42 U.S.C. § 1988).

Moreover, the Seventh Circuit's recent decision in *Local 17, Int'l Ass'n of Heat v. Young*, 775 F.2d 870 (1986), substantially weakens intervenors' argument that fees are not appropriate here. In *Local 17*, the Court of appeals affirmed Judge John F. Grady's award of attorney's fees to plaintiff's counsel who successfully had opposed a petition for certiorari to the Supreme Court.[9] The Sev-

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statutes and rules. *Id.* at 3017, n.2. Nonetheless, the intervenors now argue that "costs," as that term is used in Supreme Court Rule 50, includes attorney's fees and that if costs were not awarded, fees cannot be awarded either.

This argument ignores the fact that Supreme Court Rule 50, unlike Rule 68, contains an internal definition of costs. This distinction is "critical." *Id.* at 3017, n.2. When a rule or statute contains its own definition of costs, and this definition does not include attorney's fees, then "costs" will not be construed to include attorney's fees. *Id.* (quoting *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980)). Supreme Court Rule 50 does not define costs to include attorney's fees, thus, any limitation that Rule imposes on the assessment of costs does not extend to an award of attorney's fees.

[9] Although *Local 17* involved the assessment of attorney's fees pursuant to the Labor-Management Reporting and Disclosure Act ("LMRDA"), its reasoning is dispositive of the issue here. Further, the Seventh Circuit relied on several cases involving attorney's fees under section 1988 to reach its conclusions about the scope of the fee provisions in the LMRDA. *See* 775 F.2d at 874-75. Intervenors also argue that *Local 17* is not on point because it involved an award under the LMRDA, which does not award fees "as part of costs." Surreply at 5. Intervenors fail to mention, however, that the Seventh Circuit in *Local 17* relied upon the Supreme Court's decision in *Perkins v. Standard Oil Co. of Calif.*, 399 U.S. 222 (1970). *Perkins* involved the award of attorney's fees under Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that injured parties

enth Circuit rejected the argument that an award of fees and costs at the appellate or Supreme Court level is a prerequisite to an award of attorney's fees by the district court.[10] *Id.* at 874. The Court also rejected the argument that if the Supreme Court does not explicitly authorize a district court to award attorney's fees for work done before the Supreme Court the district court is precluded from awarding such fees. *Id.* at 874-75. Finally, the Court of Appeals rejected the argument that Supreme Court Rules 50.3, 50.6, and 52.3, which did not provide for an award of costs for work opposing certiorari, precluded an award of fees to the prevailing party which had protected its victory by successfully opposing certiorari.[11]

Third, after nearly seven years of defending the Illinois Abortion Law and two years of fee litigation, the

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"shall recover . . . the *cost of suit, including a reasonable attorney's fee.*"

[10] In reaching this decision, the Seventh Circuit relied upon the Supreme Court's holding in *Perkins*. *Supra* note 9. In *Perkins*, the district court awarded fees and costs for work done in successfully resisting a petition for certiorari, even though the Supreme Court had not assessed costs or fees. The court of appeals reversed. On later appeal, the Supreme Court reinstated the district court's holding, rejecting the court of appeals' argument that because the Supreme Court did not mention costs or fees in its decision, the award of such expenses was intended to be precluded.

[11] The intervenors' reliance upon *Grendel's Den v. Larkin*, 749 F.2d 945 (1st Cir. 1984), for its assertion that fees cannot be awarded here, is misplaced. True, the First Circuit in *Grendel's Den* declined to award costs for printing the Supreme Court briefs because Supreme Court rule 50.3 states that "the expenses of printing briefs, motions petitions, or jurisdictional statements are not taxable" to the losing appellant or petitioner. *Id.* at 957. The court did, however, award substantial fees and costs, exclusive of printing costs, notwithstanding the fact that the Supreme Court had not assessed costs against defendant, nor had it specifically authorized the lower court to award attorney's fees. 459 U.S. 116 (1982).

intervenors argue for the first time that the assessment of fees here would violate their First Amendment rights to fully participate in this litigation. This argument is defeated by the fact that the Supreme Court held that the intervenors' had no "judicially cognizable interest" in the defense of the statute, 106 S.Ct. at 1700, and by the availability of *amicus curiae* status for the expression of First Amendment values. *Amici* participation by the intervenors would have satisfied the First Amendment right of access to the federal courts recognized in *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), the two cases cited by the intervenors in support of their argument that fees cannot be assessed here.[12]

Moreover, in *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1274 (N.D. Ohio 1984), a case similar to that posed here, the district court rejected the argument that the assessment against private intervenors of a fee award for plaintiffs' Supreme Court efforts would unconstitutionally burden intervenors' efforts to promote constitutional values through litigation. The *Akron* court held that attorney's fees, under section 1988, apropriately could be assessed against intervening defendants, reasoning that:

> Intervenor-defendants could have expressed their legitimate concerns regarding the constitutionality of the challenged ordinance by appearing as amicus curiae before the Court. Instead, intervenor-defend-

[12] Intervenors here did not, indeed cannot, make the requisite showing that *amici* status was inadequate and that participation as a party was necessary to protect any of their rights. *Cf. In re Primus*, 436 U.S. 412 (1978) (First Amendment protects solicitation to represent as a party-plaintiff women who had been sterilized involuntarily, in contravention of their constitutional rights of reproductive privacy); *NAACP v. Button*, 371 U.S. 415 (1963) (First Amendment protects solicitation for litigation on behalf of black parents aimed at ending racial segregation in the public schools in Virginia).

> ants elected to become parties to this action and align themselves with the city-defendants.

604 F. Supp. at 1274. Thus, the First Amendment will not protect the intervenors in the present case from the costs of their deliberate litigation strategy.

ATTORNEY'S FEES

District courts have discretionary power to award to plaintiff reasonable attorney's fees and costs under 42 U.S.C. § 1988 if plaintiff is the prevailing party. *Hensley v. Eckerhart*, 103 S.Ct. (1983). Thus, a threshold question for the Court is to determine whether plaintiffs can be "prevailing parties" where the intervenors' Supreme Court appeal was dismissed for want of jurisdiction. Not surprisingly, the intervenors argue that the plaintiffs are not "prevailing parties" under section 1988.

Generally, plaintiffs are considered prevailing parties for purposes of section 1988 "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 103 at 1939 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978)). This determination is not self-evident here. The intervenors argue that since the Supreme Court did not reach the merits of plaintiffs' claims, at most, plaintiffs may be said to be prevailing parties with respect to the jurisdictional question. The Court disagrees.

It is important to keep in mind the posture of the case before the Supreme Court—it was the intervenors, *not* the plaintiffs, who sought action by the Supreme Court. In defending against the intervenors appeal, plaintiffs sought to have the decision of the Seventh Circuit affirmed, or in the alternative, to have the appeal dismissed. Thus, plaintiffs were successful in achieving some of the benefits sought, in that the Supreme Court's decision left in place the Court of Appeals' favorable ruling.

That plaintiffs prevailed on a jurisdictional issue neither vitiates their status as prevailing parties nor negates their claim for fees.[13] "A court should look to the substance of the litigation to determine whether an applicant has *substantially* prevailed in its position, and not merely the technical disposition of the case or motion." *Austin v. Dep't of Commerce*, 742 F.2d 1417, 1420 (Fed. Cir. 1984). *See also Ross v. Horn Institutionalized Juveniles v. Sec. Public Welfare*, 758 F.2d 897, 912 (3d Cir. 1985). Attorney's fees are appropriate under section 1988 when a plaintiff wins on a jurisdictional issue. *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 524-25 (D.C. Cir. 1985) (plaintiffs found to be "prevailing parties" under Lanham Act where action against them was dismissed for improper venue notwithstanding that the procedural dismissal was "not preclusive of a second action elsewhere"); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981) (fees awarded plaintiff as

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[13] The Court is cognizant of the Supreme Court's decision in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), holding that fees are not awardable to a party who prevails on an appeal only because of an erroneous procedural ruling below. *Hampton* may be distinguished, however, in that in *Hampton* the Supreme Court's ruling was interlocutory. Here, the Supreme Court's ruling was final and, in effect, conclusively determined the "substantial rights of the parties." 446 U.S. at 757. *See Noxell*, 771 F.2d at 525 (dismissal short of an adjudication on the merits is unlike winning on an interlocutory ruling allowing litigation to continue). The possibility of future proceedings involving the merits of this controversy, which could change the favorable results obtained by plaintiffs, is very slight. The intervenors' claim that "it may be that the [Supreme] Court would have reversed the lower court's decision had the *state* appealed" is nothing more than speculation, particularly in light of the Supreme Court's decision in *Thornburgh v. ACOG*, 106 S.Ct. 2169 (1986), the companion case to *Diamond*. In *Thornburgh*, the Court declared unconstitutional section 3210(b) of the Pennsylvania Abortion Control Act, which is almost identical to section 6(1) at issue in this case. *Id.* at 2182-83. Moreover, the State defendants have expressed no interest in appealing the present case.

"prevailing party" even though appeal court had not ruled on merits of appeal but rather had declared defendants' appeal moot and had vacated the district court's issuance of a preliminary injunction against defendants' practices).

Likewise, section 1988 allows fees to be awarded where plaintiffs prevail on appeal by securing a dismissal of their opponents' appeal. *Sotomura v. County of Hawaii*, 679 F.2d 152, 152 (9th Cir. 1982) (fees awarded plaintiffs'-appellees' who had successfully moved to dismiss defendants-appellants' appeal as untimely); *Hastings v. Maine-Endwell Central School Dist.*, 676 F.2d 893, 896-97 (2d Cir. 1982) (section 1988 authorizes an award of fees to plaintiffs who prevailed by means of a dismissal of an appeal as well as to one who had prevailed by affirmance). In essence, the dismissal of the intervenors' appeal resulted in a procedural posture similar to that in a case in which the Supreme Court leaves in place the Court of Appeals' decision by declining to grant certiorari, and it is well-settled that plaintiffs who successfully defend against a petition for certiorari are entitled to fees under section 1988. *Barnes v. Bosley*, 764 F.2d 490, 490-91 (8th Cir. 1985) (fees and costs awarded to civil rights plaintiff for resisting defendants' petition for certiorari). *See also Local 17, Internat'l Ass'n of Heat v. Young*, 775 F.2d 870, 873-76 (9th Cir. 1986) (fees and costs awarded under Labor-Management & Disclosure Act for successfully resisting a petition for certiorari).

In sum, the Court finds that plaintiffs successfully defended the Seventh Circuit's judgment in their favor, and thus, are "prevailing parties" under section 1988. Accordingly, the Court must now determine what is a "reasonable fee." "The most useful starting point for determining [this] amount is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. *See also*

Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). The Court may adjust this "lodestar" figure upwards or downwards as long as it "explains its reasons." *Gekas v. Atty. Registration & Disciplinary Comm'n*, 793 F.2d 846, 851-52 (7th Cir. 1986).

I. *Number of Hours Expended by Counsel*

To determine the number of hours reasonably spent, one must first determine the number of hours actually spent and then subtract from that figure hours which were duplicative, excessive or otherwise unnecessary. *Hensley*, 461 U.S. at 434. In presenting their fee requests, plaintiffs claim to have devoted a total of 925.69 hours to the present litigation.[14] The intervenors argue that the number of hours expended by plaintiffs' counsel is "totally unreasonable and grossly excessive." Defendants argue that the hours billed are excessive in relation to the tasks performed, and in light of the fact that the issues briefed had already been fully briefed on prior occasions.

The Court finds that the plaintiffs produced high quality work in this case as a result of a team of attorneys working together within a reasonably established division of tasks among them.[15] A review of the Supreme Court

[14]

Name of Attorney	Hours Claimed
Connell	461.90
Carey	282.40
Rand	55.50
Hunter	51.70
Susman *	57.10
Benshoof	37.10

* The intervenors argue that Ms. Susman did not serve as counsel of record to any of the Supreme Court proceedings. The covers of the joint appendix and brief filed before the Supreme clearly indicate otherwise.

[15] When possible, plaintiffs had student law clerks do preliminary research. Plaintiffs are not seeking to recover compensation for

briefs reveals that this case involved difficult constitutional and medical questions. Contrary to the intervenors' argument that the Supreme Court medical arguments were only "slightly more technical" than those raised at the district court and court of appeals level, a comparison between these briefs reveals the tremendous amount of additional work entailed in preparing the Supreme Court briefs.[16] Moreover, the intervenors' own jurisdictional statement addressed to the Supreme Court characterizes this case as presenting "substantial" questions requiring "plenary review" of the Supreme Court.

The intervenors cite no specific evidence of duplication of efforts and the Court finds no such evidence in the billing statements submitted.[17] To the contrary, the Court finds, as it previously found in connection with plaintiffs' work on the earlier phases of this litigation, that "[r]ather than engaging in unnecessary duplication of efforts, counsel appeared to take a well organized and efficient approach to the litigation." Mem. Op. Sept. 28, 1984.[18]

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this time. Nor are plaintiffs seeking compensation for time expended by paralegals and several volunteer ACLU attorneys.

[16] For the first time, the intervenors submitted a medical appendix and several charts in support of their defense of sections 6(1) and 6(4). In response, plaintiffs' counsel had to research the validity of defendants' new arguments and draft a response.

[17] The Court notes that plaintiffs' counsel kept and submitted contemporaneous time sheets which carefully document both the time expended and the task performed on a daily basis. The entries are further broken down by attorneys.

[18] Colleen Connell has sworn by affidavit that she "eliminated any time billed for duplicative or unproductive efforts," and reduced the number of hours billed by her by approximately 35% and the number of hours billed by Mr. Carey by 20%.

Plaintiffs' work before the Supreme Court involved: review of five briefs filed by the intervenors;[19] preparation of the joint appendix, research for and preparation of the response to the intervenors' jurisdictional statement; research for and preparation of plaintiffs-appellees' brief on the merits; preparation of plaintiffs-appellees' supplemental brief; preparation for oral argument, including several moot court arguments before panels of lawyers with expertise in reproductive rights and abortion litigation; oral argument; and preparation of the disputed fee petitions.[20]

In *Akron Center For Reproductive Health v. City of Akron*, 604 F. Supp. 1275 (N.D. Ohio 1985), the district court awarded plaintiffs $163,321 in fees for work done in the Supreme Court segment of the litigation. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). *Akron*, like the instant case, involved a comprehensive criminal anti-abortion statute. *Akron* also involved very sophisticated analysis of medical evidence and very technical issues of statutory construction. The district court, in awarding these substantial attorneys' fees, stated that:

> The decision of the United States Supreme Court to grant certiorari in this case against the backdrop of the national controversy respecting abortion and the many issues that have arisen since the 1973 decisions in *Doe v. Bolton*, 410 U.S. 179, and *Roe v. Wade*, 410 U.S. 113, justified a major effort on behalf of

[19] The intervenors filed a jurisdictional statement, a brief on the merits, a reply brief, a supplemental brief after oral argument, and a response to plaintiffs-appellees' supplemental brief.

[20] The plaintiffs' request compensation for 25.8 hours (Mr. Susman —1.8 hours; ACLU—24.00 hours) devoted to preparation of the fee applications and supporting documentation. Recovery for time spent preparing an attorney's fee petition has been approved by the Seventh Circuit in *Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980). The Court find these hours to be a reasonable.

> the plaintiffs in the presentation of this case before the United States Supreme Court.

604 F. Supp. at 1287. The Court finds that the same concerns motivated plaintiffs here. Thus, for the foregoing reasons, the Court finds that 925.49 [21] hours were reasonably expended defending against the intervenors' unsuccessful Supreme Court appeal.[22] None of the intervenors' arguments alter this conclusion.[23]

II. *The Hourly Rate Charged*

The plaintiffs seek the following hourly rates for counsel: Colleen Connell—$100; R. Peter Carey—$140; Nan Hunter—$125; Janet Benshoof—$140; Theodora Rand—$80; and Frank Susman—$150. The Court does not find these rates to be excessive.[24]

In *Blum v. Stenson* the Supreme Court held that " 'reasonable fees' under § 1988 are to be calculated according

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[21] The Court finds that Ms. Rand, an attorney, should not be billing at her customary rate for making copies. Thus, the Court deducts .20 hours for copying "2 fee opinions for F. Susman."

[22] The court in *Akron* allowed plaintiffs to claim 1371.3 hours (reduced from 1949.85 because of several instances of duplication), including 43.5 hours for preparation of the fee application and many hours for moot court arguments in preparation of oral argument. The Supreme Court segment of the *Akron* litigation involved seven lawyers and preparation of six briefs, including the joint appendix.

[23] Intervenors' reliance upon *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) to support a reduction of fees is misplaced. *Grendel's Den* involved a First Amendment issue which involved no medical research, no jurisdictional issues (standing and mootness were both at issue in Diamond), and only one statutory section, as opposed to the four at issue here.

[24] In its order of April 22, 1985, this Court awarded Colleen Connell an hourly rate of $90, and awarded Peter Carey an hourly rate of $125, for time expended as long as six years ago. In its September 28, 1984 decision, this Court awarded Frank Susman an hourly rate of $150.

to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." 104 S.Ct. 1541, 1547 (1984). The burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 1547 n.11. "A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate." *Id.* Once evidence of this market rate is accepted by the court, it establishe[s] a benchmark that the district judge [is] not free to ignore." *Henry v. Webermeir*, 738 F.2d 188, 197 (7th Cir. 1984).

In compliance with the dictates in *Blum*, plaintiffs have submitted affidavits from other attorneys in Chicago which demonstrate that counsels' requested rates are the prevailing rates in this community for cases like the present one.

III. COSTS

Of the $14,515.61[25] claimed, the Court disallows $9,979.00 for the costs of printing the Supreme Court briefs as being noncompensable under Supreme Court Rule 50.3; and $154.60 for duplicating costs which are normally included in counsels' hourly rate as part of the overhead expenses. Further, the Court finds that plaintiffs' request for $302.25 for taxi rides is excessive. Accordingly, the Court reduces this figure by $100.00. The Court finds that all other expenses incurred are properly chargeable to the intervenors as reasonable out-of-pocket litigation expenses.

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[25] 79 C 4541—$13,933.11 (including $9,974.00 for printing costs
79 C 4548—$ 582.50

The total award to plaintiffs is $111,778.51. This amount represents a fair and reasonable award.[26]

/s/ Charles P. Kocoras
CHARLES P. KOCORAS
United States District Judge

Dated: December 5, 1986

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[26] Attorneys' fees and costs will be borne exclusively by the intervenors—Dr. Diamond and Dr. Williams' estate. As this Court previously held, "[o]nce the intervenors chose to enter the suit . . . they placed themselves in a position which permitted them to prevent the plaintiffs from gaining the relief they sought," and thus, attorneys' fees are taxable against them. *See* Mem. Op. April 22, 1985 at 3. Here, the intervenors clearly were participating parties, in fact, they were the sole participants in opposing the relief granted to the plaintiffs. The intervenors filed the appeal to the Supreme Court. Neither state defendant filed a notice of appeal or joined in the intervenors' jurisdictional statement. The only participation by the State was the filing of a "letter of interest" under Supreme Court Rule 10.4 stating that its interest was identical to that advanced by it in the lower court. This "letter of interest" is insufficient to justify the imposition of fees against the state defendants. The Supreme Court held that while the State, as a party below, remains a party under Rule 10.4, that "status . . . does not equate with status as an appellant." *Diamond* 106 S.Ct. at 1704.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4541

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs,

v.

RICHARD M. DALEY, *et al.*,
Defendants.

No. 79 C 4548

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Plaintiffs,

v.

NEIL F. HARTIGAN, *et al.*,
Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on the intervening defendants' motion to amend this court's order of April 22, 1985, which apportioned plaintiffs' fees award equally between the State defendants and the intervening defendants. The intervenors, in an earlier motion, asked the court to amend its order in light of the Supreme Court's ruling in *Kentucky v. Graham*, 105 S. Ct. 3099 (1985).

Therefore, on October 21, 1985, the court directed the parties to brief the issue. For the reasons which follow, the intervenors' motion to amend is denied.

In its original ruling on the issue of whether the intervenors, as private parties, could be assessed attorneys' fees under section 1988, this court found that although intervenors could not have been named as defendants, once they chose to enter the suit as a party, fees were taxable against them. *Charles v. Daley*, Nos. 79 C 4541 & 79 C 4548, Mem. Op. at 3 (N.D. Ill. April 22, 1985), *citing Vulcan Society of Westchester County v. Fire Department*, 533 F. Supp. 1054, 1062 (S.D. N.Y. 1982). Further, it rejected arguments that because the State defendants were available to pay the fees in full or had failed to seek contribution for fees from intervenors, they should bear the full liability for the fees. Therefore, the court split the award for fees equally between the State defendants and intervenors.

Further support for the court's initial ruling can be found in the rationale of *Akron Center for Reproductive Health, et al. v. City of Akron, et al.*, 604 F. Supp. 1268 (N.D. Ohio 1984). In *Akron*, the intervening defendants were private individuals who joined in the defense of an Akron city ordinance regulating abortions performed on minor women. The court limited the intervenors' participation to issues directly affecting the scope of their intervention, but with regard to other issues, the intervenors were limited to amicus curiae briefs. *Id.* at 1272.

The *Akron* court found the intervenors had voluntarily chosen to align themselves with the city-defendants and by doing so "contributed to the effort required of plaintiffs to substantiate their position in Court." *Id.* at 1273. The court rejected arguments similar to those advanced here—that the intervenors took no actions to violate plaintiffs' rights and that an award of fees would stop them and others from performing a valuable public function by defending such statutes. The *Akron* court and

this court have rejected these arguments and found intervenors' inability to provide the relief sought by plaintiffs does not constitute a ground for denial of fees. Further, the intervenors could fulfill their public function of developing law and promoting constitutional values by acting in the role of amicus curiae.

Additionally, the *Akron* case cites authority in the Northern District of Illinois which supports this court's position, as well as the specific proportionment of the attorney's fees. Intervenors argue the *Akron* case is inapposite because the court there awarded a "mere 5% of the total fee award against the intervening defendants." Reply Mem. at 4. In *Wynn v. Scott*, No. 75 C 3975 Mem. Op. (N.D. Ill. Jan. 11, 1980), Judge Marshall had one of the intervenors from the present action acting as an intervenor in a similar action—a challenge to the Illinois Abortion Acts of 1975 and 1977. Plaintiffs sought their fees only from the State defendants and not the intervenors. The *Wynn* court found that the plaintiffs could not place the full burden of the fees on the State. Instead, the court reasoned that Dr. Diamond intervened, vigorously contested plaintiffs' position, and pursued an appeal to the Seventh Circuit and, therefore, the State defendant "should not be held responsible for any more than *50%* of the amount which we have concluded would be a reasonable award in this case." Mem. Op. at 6 (emphasis added).

The intervenors now ask the court to review its earlier reasoning in light of the Supreme Court's holding in *Kentucky v. Graham*. In *Graham*, the plaintiffs alleged a deprivation of their federal rights as a result of excessive force used against them during a raid and arrest. They filed a section 1983 suit seeking money damages against the Commissioner of the Kentucky State Police and seeking only recovery of fees from the Commonwealth of Kentucky. The district court dismissed the Commonwealth as a party because it enjoyed immunity

under the Eleventh Amendment. The suit was settled during trial in favor of the plaintiffs, who then moved to recover their fees as prevailing parties against the Commonwealth. The district court granted the fees requested and the Sixth Circuit Court of Appeals affirmed the award.

On appeal, the Supreme Court reversed, finding that section 1988 will not allow attorneys' fees to be recovered from a governmental entity where the prevailing plaintiff sues the governmental employees in their personal capacities only. The Court viewed the case as one requiring it to distinguish between personal and official capacity suits within the context of section 1988 fees. Because the *Graham* plaintiffs sued and prevailed against the employees in their personal capacity only, the plaintiffs won against the individual employees, not the entity which employed them. To permit the plaintiffs to recover fees against the government as a result of prevailing against the employees in their personal capacity would destroy the distinction between personal and public capacity suits against governmental officials and would be inconsistent with *Monell*'s doctrine that a municipality cannot be liable under section 1983 on the basis of *respondeat superior*. The Court concluded that only a prevailing official capacity action plaintiff is entitled to look for relief on the merits and for the fees from a governmental entity. The Eleventh Amendment prevented the Commonwealth from being a party to the suit and, therefore, the fees award against it was reversed.

The intervenors analogize their position to that of the Commonwealth in that neither could be the party legally responsible for relief on the merits. The Commonwealth enjoyed immunity and the intervenors could not provide the injunctive relief plaintiffs sought. Further, they note that the act of intervening does not convert them into a party responsible for fees. "That a plaintiff has prevailed against one party does not entitle him to fees from

another party, let alone a non-party." *Graham*, 105 S. Ct. at 3106. Therefore, the intervenors conclude that they and the Commonwealth share similar positions as parties who cannot be liable under section 1983 and cannot, therefore, be liable for section 1988 fees.

The court is not persuaded that the *Graham* decision requires it to amend the fees award. First, the court notes the Commonwealth was a named defendant and was then dismissed as a party from the case. Hence, the *Graham* plaintiffs were seeking fees from a non-party who could not and should not have been pulled into the suit. The intervenors in this case could not have been named parties, but chose to become full parties to the litigation by intervening and refusing the role of amicus curiae. As this court, the *Akron* court, and the *Wynn* court have observed, once the intervenors chose to enter the suit and to become parties, they placed themselves in a position to bar plaintiffs from gaining the relief they sought. Therefore, they stand in a different position than the Commonwealth in *Graham*. The intervenors are not named parties or non-parties, but individuals who voluntarily became fully participating parties. The Commonwealth was a non-party and decided to remain a non-party by refusing to waive its immunity.

Second, the intervenors' inability to enforce the abortion law does not grant them total immunity from fees once they become parties to the suit. This inability does raise issues about intervenors' standing to appeal the Seventh Circuit's decision to the Supreme Court once the State defendants determined not to appeal. Therefore, intervenors may lack Article III standing and lack the ability to enforce the challenged law, but they did *not* lack the ability to pose a "substantial barrier" to plaintiffs' realization of their constitutional rights during litigation before this court. In contrast, the Commonwealth's immunity and decision not to waive its immunity eliminated its ability to prevent the *Graham* plaintiffs from the relief they sought.

For these reasons, the court finds that the *Graham* decision does not require that this court amend its fees award. The rationale underlying the fees apportionment in this case and others is not disturbed by *Graham*'s holdings and conclusions concerning section 1988 fees and personal capacity suits against government employees.

/s/ Charles P. Kocoras
CHARLES P. KOCORAS
United States District Judge

Dated: Mar. 6, 1986

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4541

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs,

v.

RICHARD M. DALEY, *et al.*,
Defendants.

No. 79 C 4548

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Plaintiffs,

v.

NEIL HARTIGAN, *et al.*,
Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on two motions of the intervening defendants Diamond, Williams, and Campbell. The intervenors move to stay the execution of the judgment awarding plaintiffs attorney's fees and also move to amend the court's judgment of April 22, 1985 allocating the award of attorney's fees.

The merits of this case have been determined by this court, reviewed by the Seventh Circuit, and are presently on appeal to the United States Supreme Court. On September 24, 1984, this court awarded fees and costs in the amount of $181,287.84. After a motion to clarify and amend the judgment was filed, on April 22, 1985, the court determined that the plaintiffs' fees and costs would be borne equally by the defendants: half by the State defendants and half by the intervenors. The April 1985 ruling is the subject of the two pending motions.

I. *Motion to Stay Judgment*

The intervenors argue that because the merits of this case are pending in the Supreme Court, the plaintiffs cannot recover fees for work on claims which they have not yet ultimately prevailed upon. They argue that if they are required to pay fees now, the money would only have to be returned to them if the Supreme Court should reverse the Seventh Circuit's decision. The intervenors state that plaintiffs will not be prejudiced by a stay and intervenors would be subject to undue hardship. Finally, because the fees were awarded under section 1988, there must be a final resolution that plaintiffs' civil rights have been violated before fees are paid.

Plaintiffs oppose the grant of a stay without the posting of a supersedeas bond. They argue that intervenors have not provided any assurance that plaintiffs' judgment will be protected upon appeal nor have they shown circumstances which would warrant a waiver of the bond requirement.

The relevant law in this situation is Federal Rule of Civil Procedure 62(d) and Local Rule 28, not Federal Rules 62(h) or 54(b). Federal Rule of Civil Procedure 62(h) provides: "When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of subsequent judgment or judgments and may precribe

such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Rule 62(h) does not apply to the case at bar because this court did not expressly direct the entry of final judgment as to fewer than all of the claims or parties after determining there was no just reason for delay. Therefore, neither Rule 54(b) or Rule 62(h) are applicable.

Federal Rule of Civil Procedure 62(d) and Local Rule 28 provide the relevant law. Rule 62(d) provides that "[w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule." Generally, courts interpret this rule to require a full supersedeas bond. Under certain narrow circumstances, the courts have the discretion to modify or omit the bond as a precondition to a stay. *See, e.g., Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979); *Redding & Co. v. Russwine Constr. Co.*, 417 F.2d 721 (D.C. Cir. 1969). The unusual circumstances may render the bond unnecessary. In *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755 (D.C. Cir. 1980), the court found appeal without a bond was not an abuse of the district court's discretion where both parties had appealed on the merits, the documented net worth of the judgment debtor was 47 times the amount of the damage award, and the judgment debtor was a long time resident of the district. At this time, the intervenors have not demonstrated that they share such circumstances, that plaintiffs' judgment would be protected against loss during appeal, or that a bond would be unnecessary because of their clear ability to meet the judgment.

Finally, the status of the fees award as an award under 42 U.S.C. section 1988 does not change the applicable law or the need to protect plaintiffs' interests. This district court has required the supersedeas bond

where the appellant sought an unsecured stay of attorney's fees awarded under section 1988. Neither these opinions nor the statute indicate that the appeal of the merits where section 1988 fees are awarded warrant any different or special considerations. *See Strama v. Peterson*, 537 F. Supp. 668 (N.D. Ill. 1982), *aff'd without opinion*, (7th Cir. May 11, 1982).

For these reasons, the intervenors' motion for a stay of execution of judgment without bond is denied.

II. *Motion to Amend Judgment*

The intervenors' second motion addresses the court's award of attorney's fees against the Americans United for Life (AUL) and the individual intervenors jointly and severally. The record in this case indicates that on November 13, 1979, Judge Flaum entered an order stating "Americans United for Life Legal Defense Fund granted leave to intervene." The apparent result of this order was to name the AUL as the sole intervenor in the action. However, the original petition for intervention does not name the AUL, but rather three individuals: Dr. Diamond, Dr. Williams (now deceased), and Mr. Campbell. During the course of the litigation which followed Judge Flaum's order, the AUL acted as counsel for the three individual intervenors, not as an intervenor itself. The AUL seeks to have this discrepancy resolved by having the individuals dismissed. Alternatively, it seeks to have the AUL expressly named as one of the intervenors, along with the three individuals, who are jointly and severally liable for the fees.

The AUL's position in the case must be clarified. The original motion to intervene and petition for appointment of a guardian ad litem was filed by Diamond, Williams, and Campbell who had for their counsel the AUL Legal Defense Fund. The three individuals sought to intervene to protect their individual interests—those of a parent of an unemancipated minor, a practicing physician with

professional interests, the spouse of a woman of childbearing age. The AUL Legal Defense Fund presented to the court the interests of these three individuals and did not present any arguments that as a public interest law firm it had an interest in the case. Therefore, before and after Judge Flaum's order, the AUL Legal Defense Fund consistently represented the three individuals and their interests, not those of the AUL.

After a review of the papers submitted during the course of the briefing of the motion to intervene, this court finds that the intervening defendants are Williams, Diamond, and Campbell. Their individual interests give them status as intervenors, while the AUL never sought to intervene based on its own interests. Judge Flaum's minute order inadvertantly refers to the AUL Legal Defense Fund and mistakenly names the intervenors' counsel as the intervenor.

The court is persuaded that Judge Flaum's November 1979 minute order is a clerical error, inadvertantly naming the AUL Legal Defense Fund because the AUL could not then and cannot now meet the requisites for mandatory or permissive joinder under the Federal Rules. The AUL argues that it is the real party in interest and should be named an intervenor. However, Federal Rule of Civil Procedure 24(a)(2) requires a proposed intervenor to demonstrate, among other things, a direct, significant, and legally protectable interest in the property at issue in the law suit. As the Seventh Circuit noted recently, however, a direct and substantial interest is not met where a public interest organization asserts broad interests such as interest in protection of the unborn, the members' interests in adopting children who survive abortions, and general lobbying and opposition to abortion. *Keith v. Daley*, 764 F.2d 1265, 1268-72 (7th Cir. 1985). Based on the interests the AUL suggests to the court that it possesses in this case, the court finds it does not have a *direct and substantial* interest

which would warrant intervention. No arguments were made to Judge Flaum regarding the AUL's interests in the case; all arguments were directed to the interests of the three individuals. Presently, the AUL argues that it is the real party in interest because it solicited the three individuals to participate in the law suit. There is no doubt that the AUL has the right to solicit prospective litigants and this right is protected by the First Amendment. *In Re Primus*, 436 U.S. 412 (1978). This right to solicit, however, does not render the AUL an intervenor under Rule 24(a)(2). The AUL does not have a direct and substantial interest simply because the individuals it solicited have shown a direct and substantial interest. Further, there are no grounds for permissive intervention under Federal Rule of Civil Procedure 24(b). The AUL has not demonstrated a direct claim or right in the case.

The order of November 13, 1979 must be amended pursuant to Federal Rule of Civil Procedure 60(a). The minute order should read that "Dr. Williams, Dr. Diamond, and Mr. Campbell are granted leave to intervene." This correction renders the order consistent with the briefing then before the court and with the later history of the litigation when the individuals functioned as the intervenors and the AUL Legal Defense Fund continued as their counsel.

Further correction is required under Rule 60(a) because the April 22, 1985 order properly included the individual intervenors, but also inadvertantly relied upon Judge Flaum's order to name the AUL in the fees order. As its earlier analysis reflects, this court has now corrected Judge Flaum's order to name the individuals, rather than the AUL. Therefore, because the court has examined the earlier order and analyzed the AUL's potential interests as an intervenor and found them insufficient, it corrects its April 22, 1985 order to read: "Plaintiffs' fees and costs will be borne equally by the

defendants: half by the State defendants and half by the intervenors—Williams, Diamond, and Campbell."

The plaintiffs suggest that the AUL may be named as a party for the limited purpose of holding it jointly and severally liable with the individual intervenors for plaintiffs' attorney's fees. The AUL has not charged the intervenors for representing them and has paid the costs of the litigation. Moreover, if named as an intervenor, the AUL stated it was prepared to accept responsibility for the attorney's fees assessed against it. The AUL's willingness to be named as intervenor and to then pay attorney's fees, however, does not change its status, which is that of counsel for the individual intervenors. The court does not find it proper to deny the AUL status as a party to the suit, but also assess it attorney's fees. Therefore the individual intervenors remain jointly and severally liable for the fees assessed against them. The intervenors and their counsel may make whatever private arrangements between themselves they wish to satisfy the judgment.

Mr. Edward Grant, as counsel for the intervenors, has withdrawn an earlier motion to substitute a party for Dr. Williams, who is now deceased. The suggestion of death was filed on June 28, 1985. Under Federal Rule of Civil Procedure 25, there is a 90-day period from the date the death was suggested for a proper party to come forward for purposes of substitution. As of September 30, 1985, no party had come before this court for the purposes of substitution.

Finally, the intervenors have filed a motion to amend the April 22, 1985 allocation of fees in light of a Supreme Court ruling on June 28, 1985 in *Kentucky v. Graham*, 105 S.Ct. 3099. The parties are ordered to brief this issue for the court's consideration: intervenors' supporting memoranda is due November 1, 1985, plaintiffs' answer on November 18, 1985, with a reply on

November 25, 1985. The court will rule by mail on this matter.

/s/ Charles P. Kocoras
CHARLES P. KOCORAS
United States District Judge

Dated: 10/21/85

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4541

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs,

v.

RICHARD M. DALEY, *et al.*,
Defendants.

No. 79 C 4548

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Plaintiffs,

v.

NEIL F. HARTIGAN, *et al.*,
Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on the intervenor-defendants' motion to clarify and amend the Memorandum Opinion this Court issued September 28, 1984. *Charles v. Carey*, Nos. 79 C 4541 & 79 C 4548 Slip Op. (N.D. Ill. September 28, 1984). In the opinion, this Court awarded the plaintiffs, Allan Charles and others,

attorney's fees and costs pursuant to 42 U.S.C. section 1988. The Court found that the plaintiffs were prevailing parties in their suit to have the Illinois Omnibus Abortion laws declared unconstitutional. The intervenor-defendants (intervenors), the Americans United for Life Legal Defense Fund and others, seek to have the Court clarify and amend its order to state that *only* the "State defendants"—the Attorney General and the State's Attorney—are liable for the plaintiffs' fees and costs. For the reasons which follow, the intervenors' motion is denied. Plaintiffs fees and costs will be borne equally by the defendants: half by the State defendants and half by the intervenors.

The intervenors' motion rests on several grounds: first, they contend that the plaintiffs have not "prevailed" against them; second, that plaintiffs have no other basis for an award of legal fees and costs; third, that the plaintiffs may obtain their fees in full from the State defendants; and finally, that plaintiffs' fees and costs awarded earlier should now be reduced.

As the Court's earlier opinion stated, the plaintiffs are clearly prevailing parties under section 1988's broad definition of the term. The plaintiffs prevailed in this Court and have now prevailed in the appeal taken to the Seventh Circuit. Intervenors argue, however, that their position in the litigation is different than that of the state defendants. They contend that the plaintiffs have not and could not prevail against them because the intervenors, as private parties, could not have been named in the original complaint. They argue they could not have violated the plaintiffs' constitutional rights. Defendants' memorandum at p. 8.

Certainly, before they decided to enter into the lawsuit, the intervenors, as private parties, could not have been named as defendants nor required to provide to plaintiffs the relief which they sought. Once the intervenors chose to enter the suit in a position equal to that of the

State defendants, they placed themselves in a position which permitted them to prevent the plaintiffs from gaining the relief they sought. *Vulcan Society of Westchester County v. Fire Department*, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982). Once a person has entered a lawsuit and become a party to it, attorney's fees are taxable against it. This broad principle furthers the remedial purposes of 42 U.S.C. section 1983. *See Moten v. Bricklayers, Masons, and Plasters, Inc.*, 543 F.2d 224 (D.C. 1976).

Moreover, there can be no doubt that the intervenors were fully participating parties in the lawsuit. They argued every issue with vigor equal to or greater than the efforts of the State defendants. As this Court observed earlier, "[d]efendants were represented not only by the Illinois Attorney General's Office and the State's Attorney's Office; a tremendous volume of work was done by attorneys for the intervenors, Americans United for Life Legal Defense Fund." *Charles v. Carey*, Slip Op. at 16, n.7. Therefore, plaintiffs can be fairly said to have prevailed equally against both parties—the State defendants and the intervenors. This Court rejected the constitutional arguments advanced by both equally. On appeal, the Seventh Circuit found it appropriate to divide the costs of the appeal of the action equally between the State defendants and the intervenors. Federal Rule of Civil Procedure 54(d) allows costs "as a matter of course to the prevailing party." The Seventh Circuit did not express difficulty in determining that the plaintiffs could prevail against both sets of defendants and divided the payment of costs equally between them.

Finally, the intervenors' continuing role in this litigation further demonstrates their full participation. The intervenors have filed an appeal to the United States Supreme Court from the Seventh Circuit. *Diamond v. Charles, et al.*, No. 84-1379 (October Term 1984). Neither State defendant is a party to this appeal; neither

State defendant filed a notice of appeal or joined in intervenors' Jurisdictional Statement. In this instance, intervenors are not simply equal participants, but are the sole participants in opposing the relief granted to plaintiffs.

Because the Court finds that the plaintiffs are prevailing parties against all defendants, it need not reach the issue of whether the intervenors litigated in bad faith. The Seventh Circuit has defined bad faith as conduct without "at least a colorable basis in law." *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983). Although as this court observed earlier, the intervenors did exhibit "recalcitrance" and precipitated "unneeded expenditure of time" in the case, their behavior does not appear to have reached the Seventh Circuit's definition of bad faith. *Charles v. Carey*, Slip Op. at p. 6.

The intervenors also argue that the plaintiffs should not be permitted to obtain fees from them because the State defendants are available to pay the plaintiffs in full. This statement may well be true. Yet, it does not change the litigation history of this case. Where an intervenor takes a strong role and creates a substantial barrier to a plaintiff's realization of a constitutional right, it would be unfair to permit that party to walk away from the plaintiffs' fees and costs award. It may be unfair to the plaintiffs, who should eventually recover their fees and costs from one party or another. However, where intervenors are full participants, it would be unfair to the other defendants to impose upon them more than their fair share of the plaintiff' expenses. *Vulcan Society of Westchester City v. Fire Dept.*, 553 F. Supp. 1054, 1062 (S.D.N.Y. 1982). Additionally, the intervenors seem to argue that because the State defendants have not specifically asked for contribution from them, the State defendants have somehow admitted their full liability for the fees. The State defendants, however,

"do not take any position" on the intervenors' liability. State Defendants Response to Motion to Clarify Judgment, Attorney General at p. 2, State's Attorney at p. 2. Therefore, this Court is not persuaded that intervenors should not be assessed any of the plaintiffs' fees simply because the amount could be paid by the State defendants or because the State defendants have not sought contribution against them.

Finally, the intervenors have argued that the amount of the plaintiffs' fees and costs must be reduced. Plaintiffs reassert the State defendants' objections to the award. This Court considered fully the State defendants' objections when they were made originally. The intervenors offer no new arguments about those same objections to warrant reconsidering them. Additionally, the intervenors argue that plaintiffs' fees should be reduced for the time spent on two procedural issues. Plaintiffs prevailed only in part on those two issues. Despite only partial success, plaintiffs are entitled to fees for time spent litigating unsuccessful claims which are related to successful claims because of the United States Supreme Court's holding in *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983). Therefore, plaintiffs' fees award will not be reduced.

As the Seventh Circuit recognized in assessing costs on appeal and as this Court recognized in awarding plaintiffs' fees and costs, the two State defendants and the intervenors were at least equal participants in this litigation and may reasonably be required to bear plaintiffs' award equally. The Court also recognizes that the State defendants and the intervenors worked together and that at times the State defendants simply adopted the intervenors' papers as their own. Intervenors urge the Court not to punish the State defendants for those actions. Today's decision does not punish anyone, but instead recognizes that the State defendants and intervenors played at least equal roles in defending the abor-

tion statute against the plaintiffs' attack. The length of the litigation, the paper generated, and the admitted meshing of the three defendants' work product makes precise apportionment of fees and costs' responsibility impractical, if not impossible. The Seventh Circuit apportioned costs on appeal equally and that division seems appropriate in the situation before this Court. Intervenors cannot deny any liability at all and exact apportionment might duplicate the length of the litigation itself and leave plaintiffs waiting endlessly for defendants to sort out their own liability. For these reasons, the State defendants together are assessed $90,643.92 and the intervenors are assessed the same amount, $90,643.92. Each group may allocate within itself responsibility to come up with the required amount. Each member of the group is jointly and severally liable for the total amount due from that group.

As a final matter, the plaintiffs have filed a supplemental petition for fees and costs incurred during the appeal to the Seventh Circuit and for preparation of their fees documents. None of the defendants have submitted any papers in opposition to the petition. The plaintiffs request a total of $19,775.85, and employ the hourly attorney's rates established in the earlier ruling. The Court may decide a fees question on the papers without a hearing. The plaintiffs have presented their petition and accompanying affidavits; the defendants have not responded. The fees requested will be apportioned equally between the State defendants and the intervenors—$9,887.92 for each group.

/s/ Charles P. Kocoras
CHARLES P. KOCORAS
United States District Judge

Dated: 4/22/85

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 4541

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs,

v.

RICHARD M. DALEY, *et al.*,
Defendants.

No. 79 C 4548

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
Plaintiffs.

v.

NEIL F. HARTIGAN, *et al.*,
Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Plaintiffs have submitted petitions [1] for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 seeking compen-

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[1] This lawsuit involved two consolidated cases, *Charles v. Carey*, 79 C 4541, and *The Hope Clinic for Women, Ltd. v. Fahner*, 79 C 4548. The American Civil Liberties Union orchestrated the petition filed in 79 C 4541 on behalf of attorneys Lipton, Carey, Marshall, Royce, Finke and Rand. Mr. Susman filed his own petition in 79 C 4548.

sation for their work in this case over the last five years. For the following reasons, fees and costs in the amount of $181,287.84 shall be awarded.[2]

Plaintiffs should ordinarily recover their fees and costs under § 1988 if they are the prevailing party. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937 (1983). Plaintiffs are considered prevailing parties for purposes of § 1988 "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 1939 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-278 (1st Cir. 1978)).

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[2] This award is broken down in the following way:

Fees

Attorney	Hours	Hourly Rate	Total
Carey	180 *	125	22,500.00
Finke	270.3 **	80	21,624.00
Lipton	452.4	125	56,550.00
Marshall	142.875 ***	100	14,287.50
Rand	17.55	50	877.50
Royce	168.4	125	21,050.00
Sussman	250.8 ****	150	37,620.00
			174,509.00

Costs

79 C 4541	1,936.90
79 C 4548	4,841.94
	6,778.84
Total	$181,287.84

* Total hours sought (192.9) minus time between 12/9/83 and present attributable to appeal rather than fees petition (12.9).

** Total hours sought (287.5) minus time spent on clerical functions (14.2) and motion to withdraw (3).

*** Total hours sought (190.5) reduced by one quarter due to failure to produce contemporaneous time records. *See Hensley*, 103 S. Ct. at 1942 n.13.

**** Total hours sought (264.1) minus half time spent on fees petition (13.3).

In the instant case plaintiffs have clearly met this threshold requirement. Due to their efforts, the great bulk of Illinois' lengthy and complex omnibus abortion law was declared unconstitutional and was permanently enjoined.[3] The state legislature also amended an important provision of the law after plaintiffs had succeeded in obtaining a preliminary injunction against the original language.[4] These accomplishments easily meet the "generous" accepted formulation for a prevailing party. *Hensley*, 103 S. Ct. at 1939.

The next task before me is to decide what fee is reasonable. "The most useful starting point for determining [this] amount is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*[5] Defendants have raised challenges concerning both parts of this equation: the number of hours expended by plaintiffs' counsel and the hourly rate at which they seek reimbursement.

A. The Number of Hours Expended by Counsel

Defendants charge that the number of hours expended by plaintiffs' counsel was "excessive and duplicative." With minor exceptions,[6] defendants fail to give any

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[3] The following sections of the law were permanently enjoined: 2(8), 2(9), 2(10), 3.1(B), 3.2(A)(1), 3.2(B), 3.2(C), 3.3, 3.4, 3.5, 4, 5(3), 6(4), 6(6), 9, 10, 11(b), 11(c), 11(d), 11(e), 11(f), 12, 14(2).

[4] Section 2(2) defining viability was amended.

[5] The legislative history also suggests that the twelve factors cited in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) should be appraised. *Id.* at 1937 n.3. Plaintiffs have followed this course and have explained how these factors support their claim. Their analysis is reasonable and supported by the record. Rather than reiterate that analysis, I will focus directly on defendants' particular objections.

[6] I agree with defendants that they should not be charged for either time spent by Mr. Finke in preparation of his motion to

specific examples to support this broad allegation. Defendants sought and were granted leave to conduct discovery with regard to the fees petition, but apparently never pursued this option. In the face of plaintiffs' detailed time sheets, defendants' simple recitation of the words "excessive and duplicative" is unpersuasive.

I do not share defendants' amazement that counsel's hours during the first two months of proceedings in this case were the equivalent of one person working eight hours a day. During that time period immediately following passage of the omnibus anti-abortion law, plaintiffs had to draft their complaint and extensively brief the preliminary injunction motion. The size of the pleadings, including those submitted by defendants and intervenors,[7] and the length of the court's initial opinion attest to the breadth of issues which had to be resolved on an expedited basis. The issues were not straight forward, as defendants now seem to imply, but involved difficult constitutional and medical questions. The litigation did not simply require a methodical application of undisputed principles to an obscure statute, but a painstaking comparison of new and old statutory language and precedent, undertaken in a highly charged atmosphere and subject to under intense public scrutiny. Each

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withdraw from the case, or by Mr. Carey in conjunction with the presently pending appeal, since plaintiffs cannot yet be said to be prevailing parties on that issue. Mr. Susman's time for preparation of an apparently routine memorandum in support of his fees petition is also excessive and will be reduced by one half.

[7] Defendants were represented not only by the Illinois Attorney General's Office and the State's Attorney's Office; a tremendous volume of work was done by attorneys for the intervenors, Americans United for Life Legal Defense Fund. Although defendants contend that plaintiffs' expenditure of time was excessive, the court notes that defendants have not submitted the time sheets for all of their attorneys to allow a meaningful comparison. From the court's observation, it is expected that these lawyers devoted a very substantial number of hours to their defense of the statute.

side believed that the stakes were very high, affecting millions of people in the state of Illinois, and I cannot disagree with that assessment. In these circumstances, full-time devotion by one attorney of an average length working day to this case is not "excessive." I likewise find that hours expended on appeal and on remand were reasonable.

Defendants next argue that plaintiffs' hours must be excessive because their counsel were experienced in the area of reproductive rights litigation. While I agree that counsel had substantial experience in the subject area of this lawsuit, I do not believe that defendants' conclusion inexorably follows. Indeed, earlier this year, the State argued to Judge Marshall that the number of hours charged by plaintiffs' counsel in another abortion case had to be reduced because private counsel there did *not* have prior experience in the area of constitutional rights litigation. Judge Marshall agreed and reduced the award accordingly. *See* Defendants' Exh. B, *Planned Parenthood Association—Chicago Area v. Kempiners*, No. 81 C 3332, slip op. at 15-16 (N.D. Ill. June 14, 1984). Defendants certainly cannot have it both ways: plaintiffs' fees should not be reduced both when their counsel lack experience and when they have it. My review of the time sheets in this case convinces me that counsels' expert knowledge of the subject matter aided them in keeping their hours to the reasonable level for which they now seek reimbursement.

Defendants suggest that plaintiffs' hours were "duplicative" because they involved work by a team of lawyers who consulted with one another. This general assertion defies both common sense and legal precedent. It would certainly be highly unusual today if a case of this proportion were not litigated by a team of attorneys who worked together. This is not only true in private practice; both the State and intervening defendants called upon more than one attorney to assist in prepartion of

their case. There is also nothing inherently objectionable about the members of the team discussing issues with one another, especially with lead counsel. As Judge Grady observed in *Lackey v. Bowling*, 487 F. Supp. 1111, 1118 (N.D. Ill. 1976), "'reviewing and editing' are functions which all reasonably prudent attorneys perform." Likewise, I am not offended by the fact that the consultations between co-counsel took place over the telephone; simply denominating time spent as "telephone calls" does not imply, as defendants insinuate, that only idle chit chat took place. Defendants presumably are not demanding that counsel had to meet face to face: to do so would have necessitated additional costly travel time.

Defendants have made only the foregoing general assertions in support of the notion that plaintiffs' attorneys duplicated the work of one another. No specific examples are cited, and I find no evidence of it in the billing sheets submitted. Indeed, as is set forth in the affidavits and confirmed by my observation through the course of this litigation, each attorney for plaintiffs was assigned responsibility for a distinct portion of the multifaceted legislation. Rather than engaging in unnecessary duplication of efforts, counsel appeared to take a well organized and efficient approach to the litigation.

Finally, defendants seem to suggest that because abortion legislation is so frequently being litigated in Illinois, the issues are well known and do not justify a large expenditure of resources by plaintiffs. I am not persuaded. As I stated earlier, and is made evident by the lengthy opinions issued by this court and the Court of Appeals, the issues in this case were not easily disposed of. More important, plaintiffs can hardly be blamed for the fact that the legislature continues to pass anti-abortion legislation, year after year, which is then challenged and largely struck down by the courts, year after year. Neither can plaintiffs be chastised for vigorously prosecuting their view in the face of tenacious opposition

by defendants. Indeed, if there was one example of an unneeded expenditure of time in this case, it was precipitated by *defendants'* recalcitrance after issuance of the *Akron* decision. *See* Supplemental Affidavit of Lois Lipton, ¶ 3. In all other respects, the number of attorney hours dedicated by *both* sides bespeaks the relentless vigor with which this lawsuit was litigated, rather than inflated, duplicative or excessive demands made solely for the purposes of a fees petition.

For the foregoing reasons, I find that the number of hours expended by plaintiff's counsel was reasonable in the circumstances of this case. None of defendants' arguments alter this conclusion.

B. The Hourly Rate Charged

In *Blum v. Stenson* the Supreme Court held that " 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardlesss of whether plaintiff is represented by private or nonprofit counsel." 104 S. Ct. 1541, 1547 (1984). The burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 1547 n.11. "A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate." *Id.* Once evidence of this market rate is accepted by the court, it establishe[s] a benchmark that the district judge [is] not free to ignore." *Henry v. Webermeir*, 738 F.2d 188, 193 (7th Cir. 1984).

In many cases, including the instant one, parties will assert that the purported market rate should be increased or decreased because the tasks were especially simple or complex, or because court and non-court time should be compensated differently. In *Henry* our Court of Appeals addressed this matter and further defined the district

court's responsibility in determining reasonable market rates. The lower court should ascertain whether the "market rate" asserted by plaintiffs is a "base, composite, or average" rate. *Id.* at 195. A base billing rate is that charged "for office work on simple cases"; an average rate is that "charged to all clients regardless of the actual difficulty of, or court time involved in, the work for a particular client"; and the composite rate is that assessed for "an average of simple and difficult work, court work and office work. . ." *Id.* at 194.

In compliance with the dictates in *Blum*, plaintiffs have submitted affidavits from other attorneys in Chicago who are familiar with plaintiffs' counsel, their ability and experience, and the prevailing rate of compensation in this community for cases like the present one. According to these statements, the applicable hourly market rate for attorney Susman is $150: he is a recognized national expert in reproductive rights cases and has argued more cases in this area before the United States Supreme Court than any other lawyer. Attorneys Lipton, Carey and Royce, each of whom has practiced for more than ten years and has substantail prior experience in reproductive rights cases, are entitled to a market rate of $125 per hour. Lower rates are said to be appropriate for Marshall ($100), Finke ($80), and Rand ($50), each of whom have less experience. Because these affidavits were prepared before the *Henry* decision was rendered, they do not utilize the terminology employed in that decision and do not specify whether the delineated rates are base, average or composite figures.

Defendants raise essentially three points. First, they contend that counsel should not be compensated at the full hourly rate sought due to the "nature of the task(s)" which they performed. In particular, defendants assert that time spent on phone calls, in conferences and in

meetings are not appropriately billed at a full hourly rate.[8]

This argument is exactly like that addressed in *Henry*. The answer to it lies in my conclusion that the rates attested to in the affidavits are average rates billed to clients, encompasing both time spent arguing motions and that devoted to office preparation of the case. More importantly, the cited rates unquestionably include time spent in conference with other attorneys regarding the case, whether in person or on the phone; I know of no attorney with experience comparable to counsel here who does not bill at his or her usual average rate for these activities. My finding is also couched in the fact that the affiants who described the appropriate market rate were familiar with the type of litigation conducted here. Complex civil cases in general, and constitutional challenges to omnibus legislation in particular, nearly always require research, analysis, brief writing and careful coordination of the component parts rather than lengthy in court hearings or trials. Any estimate of a market rate for plaintiffs' type of case would impliedly cover those types of activities conducted by counsel here. Defendants offer absolutely no testimony to contradict this holding.

Defendants' second point is that Lois Lipton should receive only a rate of $100 per hour. This, they point out, is the rate which she requested in both *Planned Parenthood Association v. Kempiners* and *Akron*. Defendants' Exh. A and B. Judge Marshall awarded this requested rate in *Kempiners*.

One important difference between those cases and this one convinces me that the higher rate is appropriate here. In both *Kempiners* and *Akron*, Ms. Lipton was not lead

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[8] Defendants also argue that Mr. Finke should not be reimbursed at a rate of $80 per hour for performing clerical duties such as filing documents. I agree.

counsel; here she was throughout most of the litigation. This critical difference meant that she was forced to shoulder the substantial burden of coordinating a large, complex and highly unpopular case. Moreover, for a person with eight years of experience litigating almost exclusively in the reproductive rights area, a rate of $125 per hour is clearly appropriate.[9] In its recent opinion entitled *In Re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983), the Seventh Circuit noted that an hourly rate of $165 per hour was "substantial . . . though by no means excessive in this era of high legal fees." *Id.* at 304. *See also, Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 612 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2438 (1983) ($125 hourly rate for plaintiffs in protracted civil rights case involving race discrimination in the Chicago public housing system); *Tikalky v. City of Chicago*, 585 F. Supp. 813 (N.D. Ill. 1984) (hourly rates of $150 and $100 for lead and associate counsel in strip search case, notwithstnding fact that previously attorneys had requested lower rates); *Jane Doe v. City of Chicago*, No. 79 C 789 (N.D. Ill. April 18, 1983) (approved awards of attorneys' fees at requested hourly rates of $190 and $100 in strip search class action); *Preston v. Thompson*, 565 F. Supp. 310 (N.D. Ill. 1983), *aff'd* 681 F.2d 821 (7th Cir. 1983) (hourly fees of $125 and $75 for lead and associate counsel approved in prison "deadlocks" case); *Harceg v. Brown*, 536 F. Supp. 125 (N.D. Ill. 1982) (approving hourly fee of $135).

Third, defendants object to Frank Susman's requested hourly rate on the grounds that he was merely a passive participant in this litigation. His affidavit and time sheet show otherwise. Likewise, the affidavit of Mr. Arnold Canter and the cases previously cited refute the notion

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[9] Awarding fees at current rates is appropriate for the reasons articulated in *Tikalsky v. City of Chicago*, 585 F. Supp. 813, 816 (N.D. Ill. 1984), quoting *McPhearson v. School Dist. #186*, 465 F. Supp. 749, 759 (S.D. Ill. 1978).

that Mr. Susman's $150 hourly charge is an overly high Missouri rate, unheard of in the backwaters of Chicago.

Defendants' final objection is to Mr. Susman's request for an "enhancement" of 33%, effectively increasing his hourly rate from $150 to $200. I agree with defendants that a multiplier should not be utilized here.

The Seventh Circuit has recently had the occasion to review a number of attorneys' fees cases in which an enhancement was awarded. *In Re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983); *Johnson by Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 454 U.S. 1060 (1981). In each case, the appellate court has completely stricken or reduced the multiplier awarded by the lower court. As Circuit Court Judge Pell summarized in the *Reapportionment* decision, "district courts should not lightly apply large multipliers." 704 F.2d at 382.

With these recent and pointed admonitions in mind, I conclude that a multiplier would not be appropriate in this case. Compensation for the high quality of the attorneys' services is reflected in the reasonable, substantial hourly rates. *Johnson By Johnson*, 701 F.2d at 1212. No artificially low rate is being assigned by this court for which a multiplier must compensate. *Reapportionment Cases*, 704 F.2d at 384. Thus, by allowing the substantial hourly rates, "[t]he attorneys [are] not being penalized for taking a civil rights case, because the basic rates they [will receive are] comparable to what they would have received in private cases." *Id.*

Similarly, with the exception of the first few months of litigation during a four year period, Mr. Susman was "not precluded from accepting other employment, nor [was he] operating under peculiar time limitations." *Johnson by Johnson*, 701 F.2d at 1212. It would also seem odd to base the use of a multiplier here on the highly controversial nature of this case and the fact that

certain other clients would shun a firm which played such an active role in abortion rights cases. I do not doubt the effect on his practice averred by Susman, but this effect was undoubtedly felt long before his acceptance of this case when he first became a leading authority in this area. Indeed, to some extent Susman is probably able to attract some clients, such as the Illinois plaintiffs here, precisely because of his expertise and practice in reproductive rights cases.

Finally, it would seem particularly incongruous to award an enhancement only to attorney Susman. Plaintiffs' other counsel, familiar with this Circuit's view on the subject, have not sought a multplier. One shall not be awarded to any lawyers here.

For the foregoing reasons, I find that the hourly rates requested by plaintiffs' counsel are the appropriate average market rates for their efforts over the course of this litigation. Defendants have offered me no convincing reason for decreasing these rates, and I will not enhance them as requested by Susman.

Costs

The final area in dispute concerns the proper amount of costs to be taxed to defendants. The governing rule of this Circuit was set forth in *Henry v. Webermeir*, 738 F.2d 188, 192 (7th Cir. 1984): "the Act itself entitles the plaintiffs to their reasonable out-of-pocket expenses . . . for which lawyers normally bill their clients separately." Each of the costs requested by plaintiffs' counsel meets this standard and therefore shall be taxed to defendants.

It is so ordered.

/s/ Charles P. Kocoras
CHARLES P. KOCORAS
United States District Judge

Dated: 9/28/84

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 22, 1988

Before
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JOHN J. COFFEY, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*

Nos. 86-1552
86-3137

ALLAN G. CHARLES, M.D., *et al.*,
Plaintiffs-Appellees

vs.

RICHARD M. DALEY, State's Attorney
of Cook County, Illinois, *et al.*,
Defendants,

and

EUGENE F. DIAMOND, M.D., ESTATE OF
JASPER F. WILLIAMS, M.D., and
DAVID K. CAMPBELL,
Intervening Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division

Charles P. Kocoras, *Judge*—Nos. 79 C 4541

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *in banc* filed in the above-

entitled cause by intervening defendants-appellants, no judge * in the active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Ripple did not participate in the consideration of the petition for rehearing *in banc*.